SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

JOHN DAVID ROGERS,
Petitioner,

v.

NORFOLK SOUTHERN CORPORATION AND
NORFOLK SOUTHERN RAILWAY COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the Federal Employers' Liability Act ("FELA"), a railroad's non-delegable duty to provide a safe workplace requires the railroad to inspect third-party premises on which the railroad's workers are required to perform their duties.

2. Whether a jury's finding in an FELA suit that "fault of the employer played any part in the employee's injury," *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 510 (1957), may be overturned by a state supreme court that does not address the evidence adduced at trial.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

John David Rogers was the plaintiff below, the appellee in the court of appeals, and the petitioner in the South Carolina Supreme Court.

Norfolk Southern Corporation and Norfolk Southern Railway Company were defendants below, appellants in the court of appeals, and the respondents in the South Carolina Supreme Court.

U.S. Silica Company was a defendant below. U.S. Silica filed an appeal of the trial-court verdict, but that appeal was withdrawn following settlement.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES v

PRELIMINARY STATEMENT 1

OPINIONS BELOW 2

JURISDICTION 3

STATUTORY PROVISIONS INVOLVED 3

STATEMENT 3

REASONS FOR GRANTING THE PETITION 7

I. THE SOUTH CAROLINA SUPREME COURT'S DECISION CONFLICTS WITH THE DECISIONS OF FEDERAL AND STATE COURTS ON A RECURRING AND IMPORTANT ISSUE OF FELA LIABILITY 9

A. The FELA Imposes A Duty To Inspect A Third Party's Property Where A Railroad Requires Its Employees To Work 9

B. The Decision Below Directly Conflicts With Numerous Decisions Of Federal And State Courts 12

C. The State Supreme Court's Rule Harms Rail Workers By Impermissibly Narrowing The Scope Of The Railroad's Duty 17

II. THE SOUTH CAROLINA SUPREME COURT'S DECISION IMPERMISSIBLY EXPANDS A COURT'S ROLE IN REVIEWING JURY VERDICTS IN FELA CASES 18

A. The Decision Below Is Inconsistent With This Court's FELA Cases Affording Special Deference To Jury Verdicts 18

B. This Court Should Consider Summary Reversal 20

CONCLUSION 21

APPENDIX

TABLE OF AUTHORITIES

Page

CASES

Atchison, T. & S.F. Ry. v. Buell, 480 U.S. 557 (1987) ... 1, 8

Baltimore & Potomac R.R. v. Mackey, 157 U.S. 72 (1895) ... 10

Carr v. Union Pac. R.R., 803 So. 2d 427 (La. Ct. App. 2001), *writ denied*, 814 So. 2d 561, 563 (La. Apr. 26, 2002) ... 14

Cazad v. Chesapeake & Ohio Ry., 622 F.2d 72 (4th Cir. 1980) ... 12, 15, 20

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994) ... 7, 17

Deans v. CSX Transp., Inc., 152 F.3d 326 (4th Cir. 1998) ... 13

Ellis v. Union Pac. R.R., 329 U.S. 649 (1947) ... 8, 19

Elston v. Consolidated Rail Corp., 762 F. Supp. 180 (S.D. Ohio 1991) ... 14

Empey v. Grand Trunk Western R.R., 869 F.2d 293 (6th Cir. 1989) ... 14

Gallick v. Baltimore & Ohio R.R., 372 U.S. 108 (1963) ... 19

Gibson v. Thompson, 355 U.S. 18 (1957) ... 20

Harris v. Pennsylvania R.R., 361 U.S. 15 (1959) ... 20

Honeycutt v. Wabash Ry., 355 U.S. 424 (1958) ... 20

Lavender v. Kurn, 327 U.S. 645 (1946) ... 19

Lockard v. Missouri Pac. R.R., 894 F.2d 299 (8th Cir. 1990) 13, 15

Meeks v. Georgia S. & F. Ry., 377 U.S. 405 (1964) 8, 20

Metro-North Commuter R.R. v. Buckley, 521 U.S. 424 (1997) 7

Moore v. Terminal R.R. Ass'n, 358 U.S. 31 (1958) 20, 21

Nivens v. St. Louis Southwestern Ry., 425 F.2d 114 (5th Cir. 1970) 13, 15

Norfolk & Western Ry. v. Ayers, 123 S. Ct. 1210 (2003) 8

Norfolk & Western Ry. v. Chittum, 468 S.E.2d 877 (Va. 1996) 14

Paul v. Genesee & Wyoming Indus., Inc., 93 F. Supp. 2d 310 (W.D.N.Y. 2000) 14

Payne v. Baltimore & Ohio R.R., 309 F.2d 546 (6th Cir. 1962) 14

Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957) 2, 8, 18, 19, 20

Seaboard Sys. R.R. v. Coffee, 565 So. 2d 35 (Ala. 1990) 16, 17

Shenker v. Baltimore & Ohio R.R., 374 U.S. 1 (1963) 8, 10, 11, 17, 20

Sinkler v. Missouri Pac. R.R., 356 U.S. 326 (1958) 8

Texas & Pac. Ry. v. Archibald, 170 U.S. 665 (1898) 10

Ward v. Atlantic Coast Line R.R., 362 U.S. 396 (1960) 17

Williams v. National R.R. Passenger Corp., 161 F.3d 1059 (7th Cir. 1998) 13-14

STATUTES AND RULES

Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.* 3, 72a-76a

45 U.S.C. § 51 .....1, 72a

28 U.S.C. § 1257(a) 3

Sup. Ct. R. 16.1 20

OTHER MATERIALS

Bureau of Labor Statistics, *at* http://data.bls.gov/labjava/outside.jsp?survey=si 18

Robert L. Stern, *et al.*, *Supreme Court Practice* (8th ed. 2002)..... 20

PETITION FOR A WRIT OF CERTIORARI

John David Rogers respectfully petitions for a writ of certiorari to review the judgment of the South Carolina Supreme Court in this case.

PRELIMINARY STATEMENT

The Federal Employers' Liability Act ("FELA") imposes damages liability on "[e]very common carrier by railroad" to its employees for any "injury or death" that results "in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. This Court has long interpreted the FELA to impose a non-delegable duty on railroads to provide their employees with a safe place to work. *See, e.g., Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 558 (1987).

In this FELA case, petitioner John David Rogers was severely injured when he was dispatched to inspect a hole under a spur track at a plant of a third party served by respondents Norfolk Southern Corporation and Norfolk Southern Railway Company (collectively "Norfolk Southern"). The evidence at trial persuaded the jury that Norfolk Southern had failed to provide Rogers a safe place to work because, in all the time it had sent employees to that third party's premises, Norfolk Southern had never inspected the premises for a dangerous condition (an uncased pipe) that led to Rogers' injury.

The South Carolina Supreme Court, by a 3-2 vote, overrode that jury determination. The state supreme court did *not* dispute that no prior inspection for this dangerous condition had ever been done, but nevertheless found that, as a matter of law, Norfolk Southern could not have been negligent.

The South Carolina Supreme Court's judgment squarely conflicts with decisions of several federal courts of appeals, which have held that the FELA imposes a duty on railroads to inspect third-party premises on which their employees work. Had this case arisen in those courts – indeed, had this case been litigated in federal court sub-

ject to Fourth Circuit review – the jury's judgment in favor of Rogers would have been affirmed. That split of authority is particularly significant because it goes to the heart of Congress's intent to give railroads a strong incentive to provide a safe workplace. Under decisions such as the one below, railroads have little incentive to take affirmative steps to discover and remedy dangerous conditions before they cause injury.

Review is all the more warranted in this case because Congress's intent in enacting the FELA was "to secure the [plaintiff's] right to a jury determination." *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 509 (1957). Thus, this Court "is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination." *Id.* The Court has thus granted plenary review or summarily reversed in multiple FELA cases where a lower court has overstepped its proper function. *See* pp. 20-21, *infra*. The Court should do the same here. Notwithstanding the South Carolina Supreme Court's statement that there was not a "scintilla" of evidence supporting the jury verdict, testimony and photographs in the record proved that the hazard in question was visible and violated accepted industry standards that Norfolk Southern itself had adopted. In disregarding evidence of the railroad's failure to inspect the third party's premises, failure to inquire of possible dangerous conditions, and failure to require compliance with industry standards, the state supreme court announced an erroneous rule in conflict with numerous state and federal courts.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court (App., *infra*, 1a-10a) is reported at 588 S.E.2d 87. The opinion of the court of appeals (App., *infra*, 11a-22a) is reported at 538 S.E.2d 664.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on September 22, 2003. On November 6, 2003, the South Carolina Supreme Court denied a petition for rehearing. App., *infra*, 70a. On January 27, 2004, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 5, 2004. *Id.* at 71a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, are reproduced at App., *infra*, 72a-76a.

STATEMENT

This Statement is based on the facts as presented to the jury and on which the jury reasonably based its finding that Norfolk Southern was negligent.

1. Petitioner Rogers worked as an assistant track supervisor for Norfolk Southern. In June 1993, Rogers was sent by Norfolk Southern to inspect a hole under a spur track at a U.S. Silica sand plant served by Norfolk Southern. R. 793 (App., *infra*, 64a-66a). As Rogers approached the hole – as he was required to do – the ground under him caved in, causing Rogers significant back injuries for which he spent weeks in the hospital, needed two surgeries, and suffered numbness and debilitating pain for years. R. 72, 265, 683-85. Because of those injuries, Rogers was never again allowed to work for Norfolk Southern. R. 690-91.

The ground caved in because of the rupture of a plastic uncased slurry[1] pipe that ran under the track. R. 157-58. Breakage of slurry pipes is an ordinary occurrence because slurry is abrasive and, over time, erodes the plastic piping and causes it to rupture. R. 136-37, 215. Accordingly, written industry and general engineering standards

[1] Slurry is a mixture of sand and water.

– standards adopted by Norfolk Southern – required that slurry pipes that go under rail lines be cased, unless an exception is granted by the railroad. R. 323, 325, 330 (App., *infra*, 58a-61a). If those industry standards (known as the American Railway Engineering Association or "AREA" standards) had been followed and there had been a casing around the slurry pipe, the ground would not have caved in and Rogers would not have been injured. R. 131, 152-53, 341 (App., *infra*, 57a-58a, 61a-62a).

Despite the frequency with which Norfolk Southern employees were at the U.S. Silica facility, Norfolk Southern never inspected that premises (or otherwise inquired) to determine whether the slurry pipes that ran under the track were cased in the manner required by industry standards. R. 792-93, 801-02 (App., *infra*, 64a-68a). Norfolk Southern failed to take these actions even though the record, including photographic evidence, showed that the slurry pipes were visible – indeed, they ran above-ground for a full quarter of a mile after coming out of the ground on the side of the track – and even though the nature of the plant strongly indicated that slurry would need to be conveyed across the rail line. R. 89-90, 114-15, 1097-1106 (App., *infra*, 53a-56a). Moreover, a Norfolk Southern engineer testified that Norfolk Southern reviewed the plans and specifications of all sidetracks, including the one at U.S. Silica's facility, and that those plans would have shown the piping under the tracks. R. 570 (App., *infra*, 62a-64a).

2. After his injury, Rogers filed suit against Norfolk Southern and U.S. Silica in the Fairfield County Court of Common Pleas. Rogers asserted claims against Norfolk Southern under the FELA and alleged, among other things, that Norfolk Southern had failed to provide him a safe place to work. After a week-long trial, the jury returned a verdict for Rogers and assessed damages in the amount of $3,000,000. App., *infra*, 49a-52a.

The trial court subsequently denied Norfolk Southern's motion for judgment notwithstanding the verdict and de-

termined both that the jury was properly instructed and that its conclusions were supported by the evidence. *Id.* at 23a-48a. In a written order, the court specifically rejected Norfolk Southern's argument that it had no knowledge of, and no reason to know of, the fact that U.S. Silica installed slurry pipes under the tracks. The court found that Norfolk Southern could have discovered that fact if it had complied with its duty to inspect U.S. Silica's property – what the court termed Norfolk Southern's "duty of inquiring." *Id.* at 27a-28a. The court explained: "The evidence suggests that Norfolk Southern was familiar with the AREA regulations as well as its own guidelines requiring pipes running underneath tracks to be encased. Further, [Norfolk Southern] was surely aware of the nature of U.S. Silica's slurry operations at the . . . plant, because Norfolk Southern track supervisors had been called to that facility on prior occasions to inspect the tracks." *Id.* at 28a. Thus, "the jury could infer that Norfolk Southern breached its duty of ordinary care by failing to inquire about the encasement of these pipes." *Id.*

3. The South Carolina Court of Appeals reversed the trial court's order denying Norfolk Southern's motion for judgment notwithstanding the verdict.[2] To the court of appeals, there was "no indication" that "Norfolk had any reason to know that U.S. Silica had slurry pipes running under its spur tracks." App., *infra*, 18a.

In reaching that conclusion, however, the court of appeals acknowledged that Norfolk Southern had never inspected the U.S. Silica property before the incident to ensure compliance with the AREA standards regarding encasing of pipes. The court stated in a footnote that "Norfolk's inspections of the [U.S. Silica spur] track *only* involved looking for problems with the track that would make the railroad car derail, such as making sure the dis-

[2] While the case was on appeal, Rogers settled his claims against U.S. Silica.

tance between the rails (or the gauge) was proper." *Id.* at 17a n.6 (emphasis added).

Despite that conceded fact, the court of appeals determined that, as a matter of law, Norfolk Southern had acted reasonably because, on the day of his injury, "Rogers was sent to inspect the hole on U.S. Silica's property and determine the dangerousness of the work site." *Id.* at 19a-20a. To the court, prior to that time, it was "impossible" for Norfolk Southern to have foreseen that this dangerous condition might exist at the U.S. Silica plant where the railroad's workers were sent to work. *Id.* at 19a.

4. After granting certiorari, the South Carolina Supreme Court affirmed the court of appeals' decision by a 3-2 vote. App., *infra*, 1a-10a.

Like the court of appeals, the South Carolina Supreme Court majority determined that Norfolk Southern discharged its duties to Rogers by acting reasonably on the day of the accident. Thus, the majority concluded that Norfolk Southern had no obligation to inspect the U.S. Silica property on which its employees frequently worked *before* the accident to determine whether the slurry pipes complied with the AREA standards. The majority did not dispute that Norfolk Southern had never inspected U.S. Silica's property for failure to adhere to the AREA regulations on encasing pipes. Nevertheless, the majority "fail[ed] to see how, in this instance, Norfolk Southern could have been any more prudent" because Rogers was "Norfolk Southern's first responder following advisement by its employees of the obvious problem at the site." *Id.* at 7a.

To the majority, "Norfolk Southern was not chargeable, prior to Rogers' arrival, with knowledge of the cause of the problem at the site" and could not be expected to be "omniscient" about U.S. Silica's failure to comply with the AREA regulations and Norfolk Southern's own standards. *Id.* Accordingly, the majority held that Norfolk Southern was under no legal obligation to require a third party to

comply with industry and general engineering standards and thus provide Norfolk Southern employees with a safe place in which to work.

In dissent, Justice Burnett, joined by Justice Waller, viewed as irrelevant the majority's conclusion that there was no negligence in Norfolk Southern's actions in dispatching Rogers to the U.S. Silica site once it was informed of the danger at that location. Rather, they stressed that Norfolk Southern's non-delegable duty to provide a safe workplace required Norfolk Southern to inspect this site *previously*, which the jury could reasonably have found would have disclosed the dangerous condition created by the pipes: "Norfolk Southern's non-delegable duty required it [to] inspect the premises within the area of its responsibility for conditions injurious to its employees. This duty necessarily required it [to] be aware of conditions adjacent to the tracks which posed an immediate potential of danger to its employees. This Norfolk Southern failed to do." *Id.* at 9a. *See also id.* (describing photographic and other evidence that the existence of the slurry pipes under the rail tracks would have been detected if there had been an inspection).

REASONS FOR GRANTING THE PETITION

This case involves a split of authority between the South Carolina Supreme Court and multiple federal and state courts (including four federal circuits) on a significant and recurring issue under the FELA: whether railroads have a duty to inspect third-party premises where their employees work.

Although the existence of that conflict on this significant legal issue by itself justifies a grant of certiorari, review is particularly warranted in this case. Over many decades, this Court has vigorously enforced the "'humanitarian'" intent underlying the FELA. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 429 (1997) (quoting *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994)). It has done so in two key ways.

First, the Court has repeatedly rejected attempts to create escape hatches to employer liability for negligence that would "remove from the coverage of [the FELA] a significant area of railroad activity" or otherwise cabin the railroads' liability to employees.[3] In this regard, the Court unanimously held just last Term that permitting apportionment of damages between railroads and other parties (as opposed to joint and several liability) under the FELA would "handicap plaintiffs" and would thus be "inconsistent" with the FELA's "overall recovery facilitating thrust." *Norfolk & Western Ry. v. Ayers*, 123 S. Ct. 1210, 1225, 1227 (2003).

Second, the Court has steadfastly ensured that reviewing courts do not deny plaintiffs compensation for their injuries by invading the province of the jury in FELA cases. The Court has long stressed that it "is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of [the jury's] determination." *Rogers*, 352 U.S. at 509. The Court has thus granted either plenary review or summary reversal in a large number of FELA cases where a lower federal or state court has overstepped its proper function and usurped the authority of the jury.[4]

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[3] *Shenker v. Baltimore & Ohio R.R.*, 374 U.S. 1, 7, 11 (1963) (railroad liable for injury of worker in loading another railroad's car); *see Atchison, T. & S.F. Ry.*, 480 U.S. at 564 (fact that injury was subject to arbitration did not deprive worker of rights under the FELA); *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, 330 (1958) (railroads could not avoid liability by acting through agents "because justice demands that one who gives his labor to the furtherance of the enterprise" shall be compensated if injury results).

[4] *See, e.g., Meeks v. Georgia S. & F. Ry.*, 377 U.S. 405, 405 (1964) (per curiam) (summary reversal); *Rogers*, 352 U.S. at 509-10 ("The decisions of this Court after the 1939 amendments [to the FELA] teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury.") (footnote omitted); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947) (reversing Nebraska Supreme Court where there was "a reasonable basis" for the jury verdict of liability).

This case implicates both lines of precedent. By declining to impose a duty to inspect the property of third parties, the South Carolina Supreme Court's decision wrongly immunizes a great deal of railroad conduct from FELA liability and will lead to many injuries and deaths that could be avoided if this Court made clear that railroads have an unequivocal duty to inspect for dangerous conditions *before* harm occurs.

By the same token, the South Carolina Supreme Court's 3-2 decision reflects an extraordinarily, and improperly, aggressive view of a reviewing court's role. The court concluded that there was not a "scintilla" of evidence on which a reasonable juror could have relied to find negligence and that the railroad would have had to be "omniscient" to discover the dangerous condition created by the uncased pipes. The record, however, demonstrated that the slurry pipes did not meet accepted industry safety standards; that in several places the pipes were above-ground and visible; and that a Norfolk Southern engineer testified that the company had reviewed the plans for the U.S. Silica sidetracks, which would have revealed the existence of the pipes. A jury could rationally credit that evidence, and, as in *Rogers* and the many other cases cited above, the Court should grant certiorari to align the South Carolina Supreme Court's decision with this Court's precedents regarding the highly circumscribed role of a court reviewing an FELA jury verdict that the railroad was negligent.

I. THE SOUTH CAROLINA SUPREME COURT'S DECISION CONFLICTS WITH THE DECISIONS OF FEDERAL AND STATE COURTS ON A RECURRING AND IMPORTANT ISSUE OF FELA LIABILITY

A. The FELA Imposes A Duty To Inspect A Third Party's Property Where A Railroad Requires Its Employees To Work

Consistent with the established understanding of the FELA's broad remedial scope, this Court has long made

clear that a railroad's "nondelegable duty to provide its employees with a safe place to work" extends to circumstances where the employees "are required to go onto the premises of a third party over which the railroad has no control." *Shenker*, 374 U.S. at 7.

Shenker thus held that a railroad's non-delegable duty to create a safe workplace includes an obligation to "*inspect*" railroad cars with which employees are expected to work "*before* permitting [the] employees to work with them." *Id.* at 8-10 (emphases added). In that case, an employee of one railroad was loading mailbags onto a railcar owned by another railroad and was injured by a defective door on that car. Even though that particular railcar had just pulled into the station and the employer "lacked control or supervision" over that car, the plaintiff's employer was nonetheless liable because it had not inspected the car before the plaintiff was required to work on it. *See id.* at 10. In short, because the employer's "failure to inspect [was] uncontested," the Court held that the jury verdict should have been affirmed. *Id.*

In holding for the plaintiff railroad employee in *Shenker*, the Court relied in particular upon several prior cases dealing with the duty of a railroad to inspect third parties' railroad cars. *See id.* at 8-9 (citing and discussing *Baltimore & Potomac R.R. v. Mackey*, 157 U.S. 72 (1895), and *Texas & Pac. Ry. v. Archibald*, 170 U.S. 665 (1898)). *Shenker* explained that those cases established the "standard of care applicable to the use of cars belonging to a foreign railroad." 374 U.S. at 8.

Although *Shenker* addressed the duty to inspect a third party's railroad cars in particular, and relied upon case law dealing with that specific issue, the Court's explanation of its holding applies to any property with which, or on which, a railroad employee is required to work. That is how the federal courts of appeals have understood and applied *Shenker*. *See* pp. 12-15, *infra*.

As *Shenker* explains, the key fact there was that the railroad "required the petitioner to work with cars" be-

longing to another railroad. 374 U.S. at 10. Having done so without taking necessary "precautions" by inspecting the cars, the railroad could not escape liability no matter how brief a time the employee would work with the car, *see id.* ("the length of the sojourn is irrelevant to the duty owed to the employee"), and no matter whether it "control[led]" or "supervis[ed]" the car in question, *id.* The railroad's duty was either to undertake such inspections of third-party property or to "refus[e] to permit its employees to service" a car that was not under the railroad's control. *Id.*

In all relevant respects, this case is even stronger than *Shenker*. On numerous occasions, Rogers was required by Norfolk Southern to go to U.S. Silica's premises as part of his job. Indeed, Norfolk Southern's employees went onto U.S. Silica's premises almost daily. That being the case, Norfolk was required to take reasonable "precautions," including "inspect[ing]" that property for hazards, before its employees entered the U.S. Silica premises. *Id.* at 8, 10. Having failed to undertake such a reasonable inspection before allowing its employees on U.S. Silica's property or to inquire whether U.S. Silica had complied with AREA standards, Norfolk Southern could properly be held liable for the results of any dangerous conditions that could have been discovered and corrected if such an inspection had been done. *See id.*

In *Shenker*, as here, the railroad could not be "omniscient" as to the presence of defects on another railroad's car. In fact, the record showed that the railcar in question "had just pulled into the station." *Id.* at 7. Nor was there any reason to believe that the defendant railroad had acted improperly after it was informed of the defect in the car. Nevertheless, this Court had no difficulty finding that the jury's verdict was "required by any reasonable construction" of the FELA because the railroad had undertaken no inspection to discover defects before allowing its employee to work on the railcar. *Id.* at 10. Under *Shenker*, therefore, reversal is warranted.

B. The Decision Below Directly Conflicts With Numerous Decisions Of Federal And State Courts

Although *Shenker*'s precise holding deals with the duty to inspect railcars, a number of courts – including the Fourth, Fifth, and Eighth Circuits – have read *Shenker* to require courts to uphold jury findings of liability based on a more general understanding that a railroad has a duty to inspect third-party premises on which the railroad's employees will work. The Sixth Circuit has reached the same result under a theory that the third party's negligence is imputed to the railroad when the worker is injured on the third party's premises. The South Carolina Supreme Court, on the other hand, is joined by the Alabama Supreme Court in announcing a minority rule.

1. In *Cazad v. Chesapeake & Ohio Railway*, 622 F.2d 72 (4th Cir. 1980), for example, the railroad employee was sent by the railroad to repair a machine on the property of a third party (Union Oil). In so doing, he fell into an uncovered hole (a drain culvert) located near the tracks. *See id.* at 74. The jury found the railroad liable under the FELA, and the Fourth Circuit affirmed on that point.[5] The Fourth Circuit held that the railroad's duty to provide its employees with a safe place to work included "the responsibility to inspect the premises where its employees will be working and to take reasonable precautions to protect its employees from possible danger." *Id.* at 75. As the Fourth Circuit explained, the plaintiff "had a right to assume that [the railroad] had taken reasonable precautions to eliminate potential hazards at the work site," even though that site was controlled by a third party and the hazard itself was "not hidden from the plaintiff." *Id.* In sum, in the Fourth Circuit, the law is that railroads must inspect third-party premises to which they send

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[5] The court of appeals separately reversed the district court judgment because of an error in the damages instructions. *See* 622 F.2d at 75-76.

their employees *before* the employee is sent to such a site. *See also Deans v. CSX Transp., Inc.*, 152 F.3d 326, 330 (4th Cir. 1998) (reiterating that the "FELA imposes on the railroad carrier a duty to take reasonable precautions to inspect the workplace," but finding no liability where there was no evidence that inspection would have revealed a defect). Thus, had Rogers brought this suit in federal court in South Carolina, which would have applied *Cazad*, he would have prevailed.

The law is the same in the Eighth Circuit. In *Lockard v. Missouri Pacific Railroad*, 894 F.2d 299 (8th Cir. 1990), the plaintiff railroad employee was injured because of a dangerous condition on the property of a third party – in that instance, icy steps at a boarding house where the railroad had contracted for its workers to stay. The Eighth Circuit held that the railroad's non-delegable duty to provide a safe workplace "extends to the property of third parties" and, moreover, "includes an obligation to inspect the premises of the third party and to protect the railroad's employees from dangerous conditions." *Id.* at 303. The Eighth Circuit thus concluded that there was "sufficient evidence to support a finding that [the railroad's] negligence contributed" to the plaintiff's injury. *Id.* at 304.

The Fifth Circuit has likewise held that a railroad's duty to provide a safe workplace under the FELA creates "a positive duty to inspect and to discover defects" on property the railroad does not own. *Nivens v. St. Louis Southwestern Ry.*, 425 F.2d 114, 120 (5th Cir. 1970). In that instance, the plaintiff was injured in a derailment that occurred because of the negligent design of a track that was owned and had been designed by a third party. The court of appeals found that the railroad could reasonably be found negligent even if "it could not have known of the faulty design at its inception" because the railroad could have "inspect[ed]" the facility and "correct[ed]" the design or "refuse[d] to permit its employees from working upon" the railbed. *Id.*; *see also Williams v.*

National R.R. Passenger Corp., 161 F.3d 1059, 1063 (7th Cir. 1998) (liability exists under the FELA where a defect "could have [been] discovered upon inspection").[6]

And the Sixth Circuit has held that "[a] railroad is not relieved from liability because [a third party's] premises are unsafe or because of the existence of an unsafe condition brought about through the act of another and without fault, on the railroad's part." *Payne v. Baltimore & Ohio R.R.*, 309 F.2d 546, 549 (6th Cir. 1962). Articulating its rationale under a theory of imputed liability – *i.e.*, the third party's negligence is imputed to the railroad – the court reached exactly the same result as the post-*Shenker* federal courts of appeals: "[t]he fact that the spur track was on property not owned by [the railroad] cannot alter the duty of the [railroad]." *Id.*; *see also Empey v. Grand Trunk Western R.R.*, 869 F.2d 293, 296 (6th Cir. 1989) (similarly finding a duty to inspect the premises of a third party).

State courts have also issued rulings in conflict with the South Carolina Supreme Court in this case. *See Norfolk & Western Ry. v. Chittum*, 468 S.E.2d 877, 881 (Va. 1996) ("The employer also has a nondelegable duty to inspect its premises *and other areas* where its employees are required to work and to take reasonable precautions to protect its employees from possible danger.") (emphasis added); *Carr v. Union Pac. R.R.*, 803 So. 2d 427, 435 (La. Ct. App. 2001) ("[T]he scope of duty imposed under [the FELA] encompasses a duty on the part of the rail-

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[6] *See also Paul v. Genesee & Wyoming Indus., Inc.*, 93 F. Supp. 2d 310, 319 (W.D.N.Y. 2000) ("[A] jury could impute constructive notice to a railroad employer where the defective condition could have reasonably been discovered, but was not discovered due to the railroad's failure to inspect the relevant work area."); *Elston v. Consolidated Rail Corp.*, 762 F. Supp. 180, 185-86 (S.D. Ohio 1991) (railroad's non-delegable duty to provide safe workplace extends to common area maintained by third party – negligence alleged "is a failure to correct an unsafe condition under the control of a third-party").

roads to inspect even *third parties*' premises for possible hazards to their employees."), *writ denied*, 814 So. 2d 561, 563 (La. Apr. 26, 2002).

If this case had arisen in any of these other fora, the jury verdict in favor of petitioner Rogers would have been upheld. The court would have concluded that Norfolk Southern had "a positive duty to inspect and to discover defects from the date" it allowed its employees to work at the U.S. Silica site, *Nivens*, 425 F.2d at 120; *accord Lockard*, 894 F.2d at 303, and thus that Rogers "had a right to assume that [the railroad] had taken reasonable precautions to eliminate potential hazards at the work site," *Cazad*, 622 F.2d at 75.

2. In rejecting Rogers' appeal, the South Carolina Supreme Court announced a rule of law that "Norfolk Southern was not chargeable, prior to Rogers' arrival, with knowledge of the cause of the problem at the site." App., *infra*, 7a. The court determined that "Rogers was Norfolk Southern's first responder following advisement by its employees of the obvious problem at the site." *Id.* Thus, regardless of the evidence showing the continuous uses of the third-party premises by Norfolk Southern and its prior failure to inspect those premises, the court below "fail[ed] to see how" Norfolk Southern could have been any more prudent. *Id.*

The South Carolina Supreme Court majority therefore applied a very different legal standard from the one adhered to by the courts cited above. To the 3-2 majority, the jury's verdict was not supported by a "scintilla" of evidence because Norfolk Southern could not "have been any more prudent" *after* the hole was discovered. *Id.* Because "[t]he law does not require" the railroad to be "omniscient" of hazards on the premises where it directed Rogers to inspect, the court concluded, Norfolk Southern was not "chargeable" with knowledge of the danger caused by the uncased pipes before Rogers arrived on the scene to conduct his inspection. *Id.*

The dissenting justices in the South Carolina Supreme Court, by contrast, properly understood that Norfolk Southern's "non-delegable duty required it [to] inspect the premises," and a reasonable juror could conclude that such an inspection would have led to the discovery of the dangerous condition, because "[p]hotographs and witness testimony" in the record show that "[t]he pipes were visible going into the ground adjacent to the track." *Id.* at 9a. As the South Carolina Court of Appeals acknowledged, Norfolk Southern never claimed to have made such an inspection of the entire pertinent premises – particularly the parts immediately adjacent to the tracks that would have revealed the slurry pipeline. *See id.* at 17a n.6 (acknowledging that Norfolk Southern had only inspected the track itself). Such an inspection would have led to the discovery that the slurry pipes did not comply with the governing AREA standards. A jury could reasonably have concluded – and the jury below *did* so conclude – that the railroad was negligent in failing to inspect all parts of U.S. Silica's premises where the railroad's employees worked.

Consistent with the decision below – and also in conflict with the clear majority rule – is the Alabama Supreme Court's judgment in *Seaboard System Railroad v. Coffee*, 565 So. 2d 35 (Ala. 1990). In that case, a railroad employee received a jury verdict for negligence against the railroad under the FELA, which the state supreme court reversed. *Id.* at 38. The worker was injured as he stepped off the train onto a third party's premises where the sandy terrain created a dangerous condition. *Id.* at 36. The Alabama Supreme Court held that it was reversible error for the trial court to have instructed the jury that "'the railroad does have a non-delegable duty to provide its employees with a safe place to work despite the fact that it may not own, control, or be under a primary obligation to maintain premises on which the employee is injured.'" *Id.* The court rejected the worker's contention that the case was controlled by *Shenker*, *id.* at 38, holding instead that *Shenker* did not alter the holding

of *Ward v. Atlantic Coast Line Railroad*, 362 U.S. 396 (1960) (per curiam). But *Ward* stands for an entirely different proposition – that a railroad worker injured on a third party's premises during his off-hours is not covered by the FELA. *Id.* at 397-98. Thus, like the South Carolina Supreme Court below, the Alabama Supreme Court appears to be confused about the applicable principles governing the railroad's duty to provide a safe workplace when its employees are required to work on a third party's premises.

In sum, as the South Carolina and Alabama courts are now directed to apply the federal standards created by the FELA, there is no duty to inspect third-party premises to find and to correct potentially dangerous conditions before injuries occur. In those states, a railroad has no duty to seek to *discover* dangerous conditions *before* they could cause harm, but only to follow up when it finds out that a specific dangerous condition might exist. That rule is flatly inconsistent with *Shenker* and the decisions of four federal circuits.

C. The State Supreme Court's Rule Harms Rail Workers By Impermissibly Narrowing The Scope Of The Railroad's Duty

The rule announced by the South Carolina Supreme Court significantly narrows the railroad's non-delegable duty to create a safe workplace, and would result in fewer dangerous conditions being discovered and more railroad workers being maimed or killed. As this Court has long recognized, Congress enacted the FELA because it was cognizant of the enormous human cost of the railroad business – the "physical dangers of railroading that resulted in the death or maiming of thousands of workers every year." *Gottshall*, 512 U.S. at 542. In 2002 alone, there were 6,800 work-related injuries and illnesses

among railroad workers.[7] The FELA's core intent is to shift the cost of that human suffering to employers by making them liable when their negligence "played any part, even the slightest, in producing the injury or death." *Rogers*, 352 U.S. at 506. Certiorari is warranted to clarify that the railroads' obligation to provide a safe workplace applies to a third party's premises where the railroad directs its employees to work.

II. THE SOUTH CAROLINA SUPREME COURT'S DECISION IMPERMISSIBLY EXPANDS A COURT'S ROLE IN REVIEWING JURY VERDICTS IN FELA CASES

The South Carolina Supreme Court's decision not only conflicts with the determinations of several federal courts of appeals; it is also wrong as to a reviewing court's role in FELA cases where a jury has found a railroad negligent under that statute.

A. The Decision Below Is Inconsistent With This Court's FELA Cases Affording Special Deference To Jury Verdicts

This Court has instructed that, under the FELA, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers*, 352 U.S. at 506. Accordingly, "[j]udicial appraisal of the proofs" presented to a jury of an FELA employer's negligence is "narrowly limited to the single inquiry" whether the employer's negligence "played any part at all in the inquiry." *Id.* at 506-07.

Although the South Carolina Supreme Court purported to grant deference to the jury's determination, *see* App., *infra*, 5a, the court repeatedly disregarded evidence that a jury could reasonably credit in finding Norfolk Southern

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[7] This figure is based on a data query to a Bureau of Labor Statistics database. The data query page can be found at http://data.bls.gov/labjava/outside.jsp?survey=si.

at fault. In particular, the South Carolina Supreme Court declared that only "omniscien[ce]" could have given Norfolk Southern notice of the existence of the slurry pipes under the rail line – and thus the possible violation of the relevant industry standards – before the hole developed. *Id.* at 7a. The record amply supported a different conclusion. The jury was able to review, among other evidence: (1) photographs of the U.S. Silica premises showing that the pipes were visible; (2) testimony that the pipes were visible above ground for a quarter-mile; (3) testimony that Norfolk Southern reviewed the plans of all sidetracks, including the one on U.S. Silica's property, and that those plans would have shown pipes running under the tracks; and (4) testimony that the nature of the plant would have established a need to carry slurry in pipes under the tracks. R. 89-90, 114-15, 570, 1097-1106 (App., *infra*, 53a-56a, 62a-64a). A reasonable juror could readily find that these facts put Norfolk Southern on notice of the potentially dangerous conditions created by the uncased slurry pipes and thus that Norfolk Southern was "chargeable" with knowledge of the conditions where its employees were directed to work. App., *infra*, 7a.

By disregarding such facts and substituting its own belief that Norfolk Southern could not reasonably have known of the existence of this potential danger, the South Carolina Supreme Court majority "improperly invaded the function and province of the jury in this [FELA] case." *Gallick v. Baltimore & Ohio R.R.*, 372 U.S. 108, 113 (1963). *See also Ellis*, 329 U.S. at 653 (holding that Nebraska Supreme Court erred in reversing jury verdict in FELA case). Accordingly, here, as in prior FELA cases, vigilance by this Court is necessary to vindicate Congress's intention "to secure the [plaintiff's] right to a jury determination." *Rogers*, 352 U.S. at 509. *See also Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946) (reversing lower court's decision overturning jury verdict where evidence supported theory that mail hook protruding from train caused plaintiff's death).

B. This Court Should Consider Summary Reversal

Contrary to the South Carolina Supreme Court's belief that it is enough to say that the railroad cannot be "omniscient" as to lurking dangers, App., *infra*, 7a, this Court's precedents establish that a railroad's duties to its employees under the FELA include undertaking reasonable inspections of a third party's property where employees will be working to discover and fix such defects before a worker is harmed. *See Shenker*, 374 U.S. at 10.

In reaching a contrary conclusion, the South Carolina Supreme Court did not discuss *Shenker* (even though petitioner had cited it), much less try to distinguish that binding determination from this Court. Nor did the state supreme court cite or discuss *Cazad* (also cited by petitioner), which offered the Fourth Circuit's view of federal law that would have governed in South Carolina. For that reason, this Court may also consider this case an appropriate candidate for summary disposition on the merits pursuant to Rule 16.1. *See* Robert L. Stern, *et al.*, *Supreme Court Practice* 316 (8th ed. 2002) (noting that cases involving "appellate review of FELA jury verdicts" are a common example of the instances where the Court has granted summary reversal).

The many instances in which this Court has summarily reversed in FELA cases have involved a situation similar to that found here: an injured worker obtains a jury finding of the railroad's negligence, an appellate court overturns that verdict, and this Court summarily reverses. *See Meeks*, 377 U.S. at 405 (summary reversal where Court found sufficient evidence to support jury verdict of negligence); *Harris v. Pennsylvania R.R.*, 361 U.S. 15, 15 (1959) (per curiam) (same); *Moore v. Terminal R.R. Ass'n*, 358 U.S. 31, 31 (1958) (per curiam) (same); *Honeycutt v. Wabash Ry.*, 355 U.S. 424, 424 (1958) (per curiam) (same); *Gibson v. Thompson*, 355 U.S. 18, 18 (1957) (per curiam) (same). Here, where the jury fairly understood the record to show that nothing close to "omniscience" was necessary

for the railroad to learn of the potentially dangerous condition, reversal is likewise warranted because "the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury." *Moore*, 358 U.S. at 31 (collecting authorities).

If this Court concludes that full briefing and argument on the merits is unnecessary in light of the egregious disregard of its precedents demonstrated by the South Carolina Supreme Court, it should summarily reverse.

CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, the judgment of the South Carolina Supreme Court should be summarily reversed.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Page

APPENDIX:

A. Opinion of South Carolina Supreme Court (Sept. 22, 2003) 1a

B. Opinion of South Carolina Court of Appeals (Oct. 2, 2000) 11a

C. Order, Court of Common Pleas, County of Fairfield, South Carolina (May 13, 1997) 23a

D. Forms of Verdict, Court of Common Pleas, County of Fairfield, South Carolina (Dec. 6, 1996) 49a

E. Transcript of Record, Court of Common Pleas, County of Fairfield, South Carolina (Dec. 2-6, 1996) 53a

F. Order of South Carolina Supreme Court Denying Rehearing (Nov. 6, 2003) 70a

G. Letter from Supreme Court Clerk regarding extension request for filing a petition for a writ of certiorari (Jan. 27, 2004) 71a

H. Statutory Provisions Involved 72a

APPENDIX A

SUPREME COURT OF SOUTH CAROLINA

No. 25720

JOHN DAVID ROGERS,
Petitioner,

v.

NORFOLK SOUTHERN CORPORATION,
NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

[Decided Sept. 22, 2003]

Justice PLEICONES:

We granted certiorari to review the Court of Appeals' decision in *Rogers v. Norfolk Southern Corp.*, 343 S.C. 52, 538 S.E.2d 664 (Ct.App.2000). We affirm as modified.

FACTS[1]

Norfolk Southern Corporation ("Norfolk Southern"), under contract with U.S. Silica ("Silica"), transports Silica's product over spur tracks owned by Silica. Silica runs slurry[2] through pipes running beneath the spur lines to a storage facility.

A slurry pipe ruptured two days before John David Rogers' ("Rogers") injury. Silica employees temporarily repaired the pipes, intending to replace them at a later

[1] A more extensive treatment of the facts can be found in the Court of Appeals' opinion. *Rogers v. Norfolk Southern Corp.*, 343 S.C. 52, 538 S.E.2d 664 (Ct.App.2000).

[2] Slurry is an abrasive mixture of sand and water that can be pumped through a pipe. The slurry has a sandblasting effect on the pipes causing the pipes to be worn down over time.

date. Silica did not notify Norfolk Southern of the rupture.

On the day of Rogers' injury a Norfolk Southern train entered the Silica complex on a spur track. The Norfolk Southern crew, consisting of a conductor and an engineer, dismounted from the train for a break. They returned to discover a large hole beneath the track estimated to be between four to five feet deep and approximately eight to ten feet wide. The train engineer noticed a small stream of clear water at the bottom of the hole, which flowed outward from the direction of the Silica plant. The train conductor testified that no exposed pipe was visible in the hole. The train conductor asked Norfolk Southern to inspect the track to ensure the train could traverse it safely. Norfolk Southern sent Rogers, an assistant track supervisor, to inspect the hole.

Rogers testified that, upon arriving at the site, he could see the hole from 150 feet away but could not tell what caused the hole. Rogers' assistant testified to seeing "wet sand" around the hole. Norfolk Southern's head track inspector testified he knew a hole created by the failure of a water line would cause an inspector to be more cautious "than if it had just been water washed across the track or water leaking from a low pressure pipe, [because] it might cause a concave-type hole under the track rather than one that would go straight down."

As Rogers neared the hole, the ground shifted beneath him. Rogers jerked backwards to avoid falling and immediately felt pain in his back. Rogers sought medical treatment and was diagnosed with a herniated disc, which resulted in pain in his back and his left leg. Rogers attempted to return to work after surgery, but he has work restrictions on lifting, bending, stooping, and twenty percent impairment to his lumbar spine.

Rogers filed suit against Norfolk Southern under FELA, alleging Norfolk Southern was negligent in failing to provide him with a reasonably safe place to work. Rogers

also filed suit against Silica for common law negligence. The jury returned a $3,000,000 verdict against Silica and Norfolk Southern, apportioning 30% of the verdict to Norfolk Southern and 70% to Silica. Following the verdict, Norfolk Southern's motion for judgment notwithstanding the verdict (JNOV) was denied. The Court of Appeals reversed.

ISSUES

I. Did the Court of Appeals err in applying a state standard in reviewing a trial court's denial of Norfolk Southern's Motion for JNOV in a case premised on federal law?

II. Did the Court of Appeals err in reversing the trial court's denial of Norfolk Southern's Motion for JNOV?

I

Standard for JNOV

The Court of Appeals issued its opinion in this case before we decided *Norton v. Norfolk Southern Ry. Co.*, 350 S.C. 473, 567 S.E.2d 851 (2002) in which we held state trial courts hearing a federal claim must review motions for a new trial under a federal standard. In *Norton*, this Court noted state courts have concurrent jurisdiction to hear Federal Employers Liability Act ("FELA") claims. *See id*; 45 U.S.C. §§ 51, *et seq.* We further noted a state court trying a FELA action is controlled by federal substantive law and state procedural law. Because a motion for a new trial involves questions of the sufficiency of evidence, we held state courts must apply federal, not state, standards in reviewing such motions. *Norton v. Norfolk Southern Ry. Co., supra.*

A Motion for JNOV[3] requires a court to determine the sufficiency of the evidence. Therefore, a state court pre-

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[3] We observe that the federal rules do not provide specifically for a Motion for JNOV. The federal rules do allow for a Motion for Judgment as a Matter of Law. *See* Rule 50, FRCP. As a practical matter South Carolina's Motion for JNOV and the federal Motion for Judgment as a Matter of Law are the same.

siding over a FELA action must apply federal rules in deciding a Motion for JNOV. *Cf. Norton v. Norfolk Southern Ry. Co., supra.*

The Court of Appeals applied the state standard of review and concluded Rogers presented no evidence to support the jury's finding that Norfolk Southern was negligent.[4] The Court of Appeals erred by failing to apply the federal standard, applicable to both trial and appellate courts, which is:

> the evidence and all reasonable inferences from it are assessed in the light most favorable to the non-moving party . . . and the credibility of all evidence favoring the non-moving party is assumed. . . . Assessed in this way, the evidence must then be 'of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the non-moving party . . . .' a 'mere scintilla of evidence' is not sufficient to withstand the challenge.

Crinkley v. Holiday Inns, 844 F.2d 156, 160 (4th Cir.1988) (internal citations omitted). In other words, "the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957) (citation omitted). However, before the case may be properly left to the jury there must be more than a

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[4] The Court of Appeals wrote the state standard required a trial court to:

> view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. [Appellate courts] will reverse the trial court only when there is no evidence to support the ruling below.

Rogers, 343 S.C. at 58, 538 S.E.2d at 668 (quoting *Steinke v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999)).

scintilla of evidence establishing defendant's liability. *Brady v. Southern Ry.*, 320 U.S. 476, 479, 64 S.Ct. 232, 234, 88 L.Ed. 239 (1943) ("the weight of the evidence under . . . [FELA] must be more than a scintilla before the case may be properly left to the discretion of the trier of fact . . . .").

Both the state and federal standards require a trial judge to view the evidence in the light most favorable to the non-moving party. However, under the state standard the trial court should not grant JNOV where the evidence yields more than one inference. An appellate court may not overturn the decision of the trial court, under the state standard, if there is any evidence to support the trial court's ruling.

In contrast, under the federal standard both the trial and appellate courts must ask whether a fair, impartial, and reasonable juror could return a verdict for the non-moving party. To survive the motion the non-moving party must have presented more than a scintilla of evidence to establish his claim. In ruling on a Motion for JNOV in a FELA action, a state court must ask whether more than a scintilla of evidence was presented which "justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pac. R. Co., supra.*

II

Norfolk Southern's Motion for JNOV

Norfolk Southern has a non-delegable duty to provide Rogers a safe place to work, even when Rogers is working on the property of a third party. *See Norfolk Southern Ry. Co. v. Trimiew*, 253 Va. 22, 480 S.E.2d 104 (1997); *McGraw v. Norfolk & Western Ry. Co.*, 201 W.Va. 675, 500 S.E.2d 300 (1997); *Schrier v. Indiana Harbor Belt R. Co.*, 102 Ill.App.3d 855, 58 Ill.Dec. 262, 430 N.E.2d 204 (1981). Norfolk Southern's duty to provide a safe working environment extends only to foreseeable dangers. *Brown v.*

CSX Transp., Inc., 18 F.3d 245, 248 (4th Cir.1994) (quoting *Atlantic Coast Line R. Co. v. Craven*, 185 F.2d 176, 178 (4th Cir.1950) ("An employer has a duty to provide his employees a safe place to work, but this duty cannot be absolute. Dangers are implicit in such occupations as railroading, and railroads are not insurers of their employees.")); *Brown*, 18 F.3d at 250 (an employer "may not be held liable if it had no reasonable way of knowing that the hazard, which caused [Plaintiff's] injury, existed.").

Congress mandated courts construe FELA provisions liberally in favor of injured railroad workers. *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). Although FELA is to be liberally construed, this "does not mean that it is a workers' compensation statute. [The U.S. Supreme Court has] insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.'" *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543, 114 S.Ct. 2396, 2404, 129 L.Ed.2d 427 (1994). An employee may recover under FELA only upon proving the employer's negligence contributed, in whole or in part, to the worker's injury. *See* 45 U.S.C. § 51 (a railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier"). Plaintiffs, even under FELA, must prove the traditional common law elements of negligence: duty, breach, causation and damages. *See Brown, supra.* Reasonable foreseeability of harm is essential to a FELA claim. *See Brown*, 18 F.3d at 249.

Rogers was sent to the track on U.S. Silica's premises to inspect the track and report any problems or damages found, and advise his supervisors of any necessary repairs. On the day Rogers was injured, Rogers was sent to the track specifically to inspect the hole that was discovered by the conductor and engineer. To prevail on a

FELA negligence claim, Rogers must prove "duty, breach, foreseeability, and causation." *Adams v. CSX Transp. Inc.*, 899 F.2d 536, 539 (6th Cir.1990). Norfolk Southern had a duty to provide its employees with a safe workplace. *Id.* Nevertheless, "[t]he employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end, the degree of care being commensurate with the danger reasonably to be anticipated." *Isgett v. Seaboard Coast Line R.R. Co.*, 332 F. Supp. 1127, 1139 (D.S.C.1971).

We fail to see how, in this instance, Norfolk Southern could have been any more prudent. Rogers was Norfolk Southern's first responder following advisement by its employees of the obvious problem at the site. Rogers' job was to inspect the area around the track and to inform Norfolk Southern of any danger.[5] We agree with the Court of Appeals that Norfolk Southern was not chargeable, prior to Rogers' arrival, with knowledge of the cause of the problem at the site. *Rogers v. Norfolk Southern Corp.*, 343 S.C. 52, 61, 538 S.E.2d 664, 669 (Ct.App.2000). Norfolk Southern was not, therefore, negligent in any particular in dispatching Rogers to inspect the site.

The law does not require that employers be omniscient, only that they exercise reasonable care. Rogers was the agent of Norfolk Southern entrusted with informing the company of dangers in the Norfolk Southern workplace. No more than a mere scintilla of evidence, if that, was adduced at trial from which the negligence of Norfolk Southern could be inferred. We conclude that a fair, impartial and reasonable juror could not have returned a verdict against Norfolk Southern. The Court of Appeals

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[5] *Cf. Hurley v. Patapsco & Back Rivers R.R. Co.*, 888 F.2d 327 (4th Cir.1989) (Directed verdict was proper when appellant was only employee qualified to operate lathe, and "without notice from appellant as to possibly dangerous conditions not evident to a layperson, appellee had no opportunity to correct these conditions and cannot be found negligent").

arrived at the correct result as to all allegations of negligence – albeit through application of the incorrect standard.

We therefore AFFIRM AS MODIFIED the Court of Appeals' decision.

MOORE, A.C.J., and Acting Justice James C. Williams, Jr., concur.

BURNETT, J., dissenting in a separate opinion in which WALLER, J., concurs.

Justice BURNETT:

I respectfully dissent. The evidence presented by Rogers is more than sufficient to satisfy the federal "more than a mere scintilla" standard.

> Under the federal standard, applied alike at trial and on review, the evidence and all reasonable inferences from it are assessed in the light most favorable to the non-moving party . . . and the credibility of all evidence favoring the non-moving party is assumed. . . . Assessed in this way, the evidence must then be 'of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment could reasonably return a verdict for the non-moving party. . . .' A 'mere scintilla of evidence' is not sufficient to withstand the challenge.

Crinkley v. Holiday Inns, 844 F.2d 156, 160 (4th Cir.1988) (internal citations omitted).

A scintilla is defined as "a trace" of evidence. Black's Law Dictionary 1347 (7th ed.1999).

The majority concludes Norfolk Southern was not negligent in dispatching Rogers to inspect the site. I agree. The mere dispatch of Rogers to the site was not negligent.

In my opinion, however, Norfolk Southern was negligent in failing to provide Rogers with a safe place to work. As noted by the majority, Norfolk Southern had a non-

delegable duty to provide Rogers a safe place to work, even when Rogers was working on the property of a third party. *See Norfolk Southern Ry. Co. v. Trimiew*, 253 Va. 22, 480 S.E.2d 104 (1997); *McGraw v. Norfolk & Western Ry. Co.*, 201 W.Va. 675, 500 S.E.2d 300 (1997); *Schrier v. Indiana Harbor Belt R. Co.*, 102 Ill.App.3d 855, 58 Ill.Dec. 262, 430 N.E.2d 204 (1981).

Viewing the testimony and its inferences in the light most favorable to Rogers as we are required to do, Norfolk Southern was negligent in failing to provide a safe place for Rogers to perform his work. Norfolk Southern's non-delegable duty required it inspect the premises within the area of its responsibility for conditions injurious to its employees. This duty necessarily required it be aware of conditions adjacent to the tracks which posed an immediate potential of danger to its employees. This Norfolk Southern failed to do.

The convex hole created beneath the Norfolk Southern tracks resulted from the rupture of slurry pipes which ran beneath the tracks. The pipes were visible going into the ground adjacent to the track and emerging from the ground on the opposite side of the track. Although the installation of the pipes was not disclosed to Norfolk Southern, the pipes were not concealed from view. Photographs and witness testimony show the entry of the slurry pipes into the ground twenty feet from the spur track. It was clearly foreseeable that a dangerous condition existed adjacent to Norfolk Southern's tracks.

In my opinion, more than a mere scintilla, a trace, of evidence was introduced establishing Norfolk Southern knew or, in the exercise of ordinary care, should have known the conditions at Silica posed a danger to its employees. Accordingly, under FELA standards, Rogers is entitled to prevail. *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957) (under FELA, an employee prevails if he establishes "that employer negligence played any part, even the slightest, in

producing the injury or death for which damages are sought.").

The majority opines no fair, impartial, and reasonable juror could have returned a verdict against Norfolk Southern. The record, however, is devoid of evidence the jury which returned the verdict against Norfolk Southern was unfair, partial, or unreasonable. Instead, Rogers presented this jury more than a mere scintilla of evidence Norfolk Southern breached its non-delegable duty, resulting in injury to him.

I would REVERSE the Court of Appeals' decision.

WALLER, J., concurs.

APPENDIX B

COURT OF APPEALS OF SOUTH CAROLINA

No. 3248

JOHN DAVID ROGERS,
Respondent,

v.

NORFOLK SOUTHERN CORPORATION,
NORFOLK SOUTHERN RAILWAY COMPANY,
Appellant.

[Decided Oct. 2, 2000]

CURETON, Judge:

This appeal arises from claims filed by John David Rogers (Rogers) against his employer Norfolk Southern (Norfolk) under the Federal Employer's Liability Act (the FELA)[1] and against the U.S. Silica Company (U.S. Silica) for common law negligence. Following the trial of this case, the jury returned a verdict of $3,000,000, apportioning thirty percent to Norfolk and seventy percent to U.S. Silica. On appeal, Norfolk argues: 1) Rogers should not recover under the FELA because Norfolk was not negligent; 2) Rogers's negligence was the sole cause of his injuries; 3) the verdict was excessive; 4) the court erred in omitting a jury charge regarding the taxability of the award; and 5) the court erred in holding post-trial that the jury's apportionment of damages was not binding on the parties. We reverse.

[1] The FELA subjects every common carrier by railroad engaging in interstate commerce to liability to employees injured as a result of the carrier's negligence. *See* 45 U.S.C. § 51, *et seq.* State courts have concurrent jurisdiction with federal courts in FELA suits. 45 U.S.C. § 56.

FACTS

Rogers, an assistant track supervisor for Norfolk, was injured while inspecting a hole that appeared around two sets of railroad sidetracks on U.S. Silica's premises. Generally, Rogers's duties were to inspect Norfolk's tracks in his assigned work area, appraise any problems or damage found, and advise his supervisors of necessary repairs.

On the day Rogers was injured, his supervisor sent him to inspect a large hole under the tracks on U.S. Silica's premises to see whether the tracks were safe to traverse. A Norfolk train engineer and conductor discovered the hole upon their return from a lunch break. The hole was approximately four to five feet deep, over eight feet across, with steep sides, and somewhat curved in on one side so as to cause the ground above to be undermined. The train engineer and conductor also reported the hole to at least two U.S. Silica employees who made no comment or explanation concerning the cause of the hole or any prior problems in the area.

Two days earlier, the underground slurry pipe that ran below the railroad tracks blew out.[2] When the blowout occurred, U.S. Silica employees bolted a temporary band over the pipe and filled in the hole caused by the blowout.

When Rogers arrived to inspect the hole, he could see the hole from about 150 feet away. He testified that he had no idea what could have caused the hole when he first

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[2] Slurry is sand that has been mixed with water so that it can be pumped through a pipe. It has a "sandblasting" effect, however, on the pipes through which it is pumped. This sandblasting effect causes the plastic pipes to wear out. Once a pipe springs a leak, it is a certainty that other leaks will appear soon and the entire pipe must be replaced. Normally, slurry is pumped through the pipe, but sometimes U.S. Silica's employees wash out the slurry line by pumping pure water through it. If the pipe is not encased within another protective pipe and has a blowout while water is being pumped through it, a hole will form in the sandy ground above the pipe and the ground will eventually cave in. Apparently, this is what caused the hole Rogers was sent to inspect.

observed it. Rogers could not see that some of the ground near the hole was undermined because of the manner in which it was undermined and the direction from which he approached the hole. Rogers told his assistant to "stand back" as he went to inspect the hole. Walking on the steel rails and track structure, Rogers stood within two to three feet from the hole. As Rogers attempted to look into the hole, the ground began to give way under his right foot. When he felt the ground giving way, Rogers jerked back from the hole to catch himself, twisted, and immediately felt pain in his back. Rogers reported the accident to his supervisor and went home.

Upon seeking medical treatment for back and left leg pain stemming from the incident, Rogers was diagnosed with a herniated disc. Surgery was performed to remove the ruptured disc, but the surgery did not relieve Rogers's leg pain. Rogers attempted to return to work after the surgery, but Norfolk would not permit him to do so. At the time of trial, Rogers had held five different jobs, none of which offered benefits and salary comparable to what he received at Norfolk.

Rogers's prognosis was described by Dr. John Eugene Alexander, an orthopedist, as poor. Although Rogers had sustained back injuries before this incident[3], he had been able to return to work with restrictions. Rogers was working well within those restrictions without difficulty until this incident occurred. Because of this injury, Rogers has work restrictions on lifting, bending, and stooping, as well as an additional twenty percent impairment to his lumbar spine.[4] Dr. Alexander opined that Rogers will never be able to do the type of work he did in the past or to resume his previous recreational activities, and that his condition will progressively worsen with

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[3] Rogers made FELA claims on both of these injuries, and both claims were resolved.

[4] Rogers already had a thirty percent impairment to the back as a result of the two prior back injuries.

time. At the time of trial, Rogers suffered from depression and had problems sleeping because of constant pain.

As a result of his accident and injuries, Rogers filed suit against Norfolk under the FELA, alleging Norfolk was negligent in failing to provide him with a reasonably safe place to work. Rogers also brought suit against U.S. Silica for common law negligence, alleging U.S. Silica had negligently failed to maintain its facility, grounds, and property in a reasonably safe and suitable condition for business invitees. Rogers also alleged U.S. Silica negligently failed to warn him of the dangerous and hazardous condition of its facility, grounds and property. U.S. Silica and Norfolk answered with general denials and asserted the affirmative defense of Rogers's contributory negligence. Norfolk also asserted release, stemming from Rogers's execution of a release in 1990 and one in 1995, and failure to mitigate damages as defenses. Norfolk also alleged an indemnity cross-claim against U.S. Silica.

The case was heard by a judge and jury in a five-day trial. At the close of the evidence, both U.S. Silica and Norfolk moved for directed verdicts. The trial court denied the motions. The jury returned a verdict for Rogers in the amount of $3,000,000 actual damages. The jury apportioned thirty percent of the verdict to Norfolk ($900,000) and seventy percent to U.S. Silica ($2,100,000). The jury found no negligence on Rogers's part. Following the return of this verdict, U.S. Silica and Norfolk moved for judgment notwithstanding the verdict and, alternatively, for a new trial or new trial *nisi remittitur*. The trial court denied these motions. Both defendants then moved for reconsideration on various grounds. Those motions were also denied. This appeal followed.[5]

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[5] U.S. Silica also brought an appeal of the verdict before this Court. However, during the pendency of the appeal, Rogers and U.S. Silica entered into a settlement agreement and the appeal was withdrawn.

LAW/ANALYSIS

In an action at law on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings. *Townes Assocs. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

Norfolk argues the trial court erred in denying its motion for judgment notwithstanding the verdict (JNOV) because no issues of fact existed as to whether Norfolk was negligent. We agree.

> In ruling on motions for directed verdict or judgment notwithstanding the verdict, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions. The trial court must deny the motions when the evidence yields more than one inference or its inference is in doubt. This Court will reverse the trial court only when there is no evidence to support the ruling below.

Steinke v. South Carolina Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

Under the FELA, a railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. The FELA requires that liability arise from negligence which causes the employee's injury. *Brady v. Southern Ry. Co.*, 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943). "[U]nder the FELA, 'plaintiffs are still required to prove traditional common law elements of negligence: duty, breach, foreseeability, and causation.'" *Brown v. CSX Transp., Inc.*, 18 F.3d 245, 249 (4th Cir.1994) (quoting *Robert v. Consolidated Rail Corp.*, 832 F.2d 3, 6 (1st Cir.1987)); *see also Lyles v. Alabama State Docks Terminal Ry.*, 730 So.2d

123, 124 (Ala.1998) ("To prevail in a FELA action, the plaintiff must prove the traditional common-law elements of negligence: duty, breach of duty, foreseeability, and causation.").

> The [history] has been said to reduce the extent of the negligence required, as well as the quantum of proof necessary to establish it, to the "vanishing point." While it is still undoubtedly true that there must be some shreds of proof both of negligence and of causation, and that "speculation, conjecture, and possibilities" will not be enough, there appears to be little doubt that under [FELA] jury verdicts for the plaintiff can be sustained upon evidence which would not be sufficient in the ordinary negligence action.

Norton v. Norfolk Southern Ry. Co., 341 S.C. 165, 533 S.E.2d 608 (2000) (quoting W. Page Keeton et al., *Prosser & Keaton on Torts* § 80, at 579) (alterations in original).

Rogers does not allege he was injured by any activity or instrumentality of Norfolk. Rather, he contends Norfolk sent him to an unreasonably unsafe place to work. "Under the FELA, an employer has a nondelegable, continuing duty to exercise reasonable care in furnishing its employees a safe place to work." *Norfolk Southern Ry. Co. v. Trimiew*, 253 Va. 22, 480 S.E.2d 104, 106 (1997); *see also Crawford v. Norfolk & W. Ry. Co.*, 901 S.W.2d 252, 254 (Mo.Ct.App.1995); *McGraw v. Norfolk & W. Ry. Co.*, 201 W.Va. 675, 500 S.E.2d 300 (1997). "This duty exists even when the employees are on the premises of a third party over which the employer has no control." *Schrier v. Indiana Harbor Belt R. Co.*, 102 Ill.App.3d 855, 58 Ill.Dec. 262, 430 N.E.2d 204, 207 (1981) (citations omitted).

The duty of providing a reasonably safe place to work does not require the elimination of all dangers, but it does require the elimination of the dangers which could be removed by the exercise of reasonable care on the part of the employer. *Crawford*, 901 S.W.2d 252. The employee needs only to show that he was injured because of an un-

safe condition that could have been reasonably removed by the employer, and that the employer's negligence played any part, even the slightest, in producing the employee's injury. *See* Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*; *Kaminski v. Chicago River & Indian R. Co.*, 200 F.2d 1 (7th Cir.1952); *Trimiew*, 480 S.E.2d at 106 ("... plaintiff's proof must justify with reason the conclusion that an employer's negligence played any part, even the slightest, in producing the injury for which damages are sought.").

Norfolk contends that it had no knowledge, actual or constructive, that the underground slurry pipe which caused the hole was installed beneath U.S. Silica's spur track[6], and, therefore, was not negligent in sending Rogers to the site. We agree with Norfolk.

Reasonable foreseeability of harm is an essential ingredient of FELA negligence. "[The railroad] may not be held liable if it had no reasonable way of knowing that the hazard, which caused [the plaintiff's] injury, existed." *Brown*, 18 F.3d at 250. "Thus ... the plaintiff must show circumstances which a railroad, in the exercise of due care, could have reasonably foreseen as creating a potential for harm." *McGraw*, 500 S.E.2d at 305. "Whether a particular danger was foreseeable ... is a fact issue and, 'as with all factual issues under the FELA, the right of the jury to pass on this issue must be liberally construed.'" *Id.* (quoting *Syverson v. Consolidated Rail Corp.*, 19 F.3d 824, 826 (1994)). However,

> under the FELA, the weight of the evidence must exceed a scintilla before the case properly may be left to the jury's discretion. (Citations omitted). If, without

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[6] The evidence in the record establishes without contradiction that U.S. Silica owns and maintains this spur track. Norfolk used the track to reach the industry from its main line. Norfolk's inspections of the track only involved looking for problems with the track that would make the railroad car derail, such as making sure the distance between the rails (or the gauge) was proper.

> weighing the credibility of the witnesses, the evidence supports "but one reasonable conclusion as to the verdict," the court should decide the matter, thus saving the result "from the mischance of speculation over legally unfounded claims."

Trimiew, 480 S.E.2d at 108 (quoting *Stover v. Norfolk & W. Ry. Co.*, 249 Va. 192, 455 S.E.2d 238 (1995) (quoting *Brady*, 320 U.S. at 479-80, 64 S.Ct. 232)).

In its order addressing Norfolk's post-trial JNOV motion, the trial court found Norfolk had constructive notice of the slurry pipes underneath the spur tracks at the U.S. Silica plant. The court determined that Norfolk was familiar with railroad industry standards promulgated by the American Railroad Engineering Association (AREA). These standards require portions of pipes running under railroad tracks to be encased and require industries to notify a railroad if they want to install pipes beneath any track whether owned by the railroad or the industry. Additionally, the court determined Norfolk was "surely aware of the nature of U.S. Silica's slurry operations" at the plant site because track supervisors had inspected the tracks at the site before. The court concluded that "[t]hese facts alone provide sufficient basis to infer that Norfolk Southern had constructive notice of the presence of slurry pipes underneath the spur track at the U.S. Silica plant," and therefore, the jury could infer that Norfolk had breached its duty of ordinary care by failing to inquire about the encasement of these pipes.

However, there is no indication from the record that Norfolk had any reason to know that U.S. Silica had slurry pipes running under its spur tracks, much less that these pipes were not encased as required by the AREA standards and by general engineering standards. Even when the conductor found the hole on the afternoon in question, none of U.S. Silica's personnel made any mention of the slurry pipes below the tracks or that such a pipe under the track had burst two days before this incident. Norfolk cannot be expected to know the operational

details of a sand plant or of the placement of pipes it did not know even existed.

We hold it was not reasonably foreseeable that Rogers would be injured by inspecting the track or a hole under the tracks at this location. Unless a Norfolk employee saw or knew of the prior pipe leaks, or at least knew that pipes were in the ground beneath the tracks, it is impossible for Norfolk to have had actual or constructive knowledge of any danger at this location. "Events too remote to require reasonable prevision need not be anticipated." *Brady*, 320 U.S. at 483, 64 S.Ct. 232.

Additionally under the FELA, an employer's "'. . . conduct may become unreasonable if the employer, after being informed that a condition is potentially dangerous, fails to investigate' and, if necessary, correct the problem." *Gallose v. Long Island R. Co.*, 878 F.2d 80, 85 (2d Cir.1989) (quoting *Mohn v. Marla Marie, Inc.*, 625 F.2d 900, 902 (9th Cir.1980)).

> The employer must conduct proper inspections to discover dangers in places where employees are required to work, and must take reasonable precautions for the employees' safety after determining the existence of such dangers. But even under the FELA, an employee still must establish that the employer was guilty of some act of negligence in order to recover.

Trimiew, 480 S.E.2d at 106 (citations omitted). The degree of care a railroad must exercise is "commensurate with the danger reasonably to be anticipated." *Atlantic Coast Line R. Co. v. Dixon*, 189 F.2d 525, 527 (5th Cir.1951).

Rogers was Norfolk's investigator and the Norfolk employee most familiar with the U.S. Silica site.[7] In fact,

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[7] In fact, Rogers had inspected this spur tract on numerous prior occasions. Rogers testified that he had visited the site approximately once a month since he was assigned to the territory eighteen months before his injury.

Rogers was sent to inspect the hole on U.S. Silica's property and determine the dangerousness of the work site. Rogers was not required to disregard any of his doctor's earlier recommendations about limiting his physical activities in his position as investigator. Given Norfolk's lack of knowledge concerning the nature of the hole, it could not have provided Rogers with any warnings that would have prevented the harm to Rogers.

Finally, Rogers asserts Norfolk was negligent in failing to procure U.S. Silica's execution of the railroad's standard sidetrack agreement. Norfolk's predecessor repeatedly asked U.S. Silica's predecessor to execute the sidetrack agreement, but the agreement was never signed. Rogers maintains U.S. Silica's and its predecessor's refusal to execute the sidetrack agreement should have given Norfolk constructive notice that U.S. Silica was not complying with the AREA standards. However, Norfolk had no reason to suspect that U.S. Silica's refusal to sign the sidetrack agreement stemmed from its failure to encase the pipes below the tracks in blatant violation of the industry's standards.[8]

Rogers also maintains, absent the sidetrack agreement, U.S. Silica was under no obligation to comply with the railroad's standards. When cross-examined by U.S. Silica's attorney, Rogers's expert at trial agreed that U.S. Silica was under no obligation to abide by the AREA standards if Norfolk never required that they do so. In closing argument, Rogers argued that if Norfolk had refused service until the sidetrack agreement was signed, U.S. Silica would have signed the agreement. Rogers maintains that if U.S. Silica had signed the agreement, it would have

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[8] Correspondence from U.S. Silica's predecessor to Norfolk's predecessor indicates that the industry's failure to execute the sidetrack agreement was unrelated to the unencased pipes below the spur tracks. According to the correspondence, the industry wanted the railroad to modify the paragraphs in the sidetrack agreement addressing use of the spur track by third parties, close clearances, indemnification of the railroad's mistakes, and the right to repair the track.

abided by the regulations and encased the pipes, thereby avoiding Rogers's injury. Therefore, Rogers argues, it was negligent for Norfolk to provide services to U.S. Silica when it had no assurances that the spur track would be operated in accordance with railroad regulations. Rogers further argues his injury would have been avoided if Norfolk had refused to operate the spur track until the sidetrack agreement was executed. We disagree.

Even if Norfolk should have insisted that U.S. Silica execute the sidetrack agreement, the causal connection between Norfolk's failure to do so and Rogers's injury is extremely tenuous. The evidence showed U.S. Silica knew about the railroad's regulations, but still failed to comply with them. U.S. Silica's former plant manager, George Foster, testified he knew the company was supposed to notify the railroad before putting pipes under the tracks. He also testified to knowing that, under the railroad's rules, pipes going under industry tracks should be encased. Furthermore, encasing pipes which are located below traversed areas is not just a railroad industry standard, but is a general principle of civil engineering according to Rogers's expert. It is improbable that U.S. Silica would have complied with the standards of the sidetrack agreement if it had been executed. The execution of the sidetrack agreement would have established Norfolk's right to indemnification pursuant to the agreement.[9] It would not have provided Norfolk with any additional assurance that U.S. Silica would abide by the railroad's standards. *See Norton v. Norfolk Southern Ry. Co.*, 341 S.C. 165, 533 S.E.2d 608 (2000) (quoting W. Page Keeton et al., *Prosser & Keaton on Torts* § 80, at 579) ("[T]here must be some shreds of proof both of negligence and of causation, and [ ] speculation, conjecture, and possibilities

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[9] *Cf. Illinois Cent. Gulf. R. Co. v. Crown Zellerbach Corp.*, 859 F.2d 386 (5th Cir.1988); *Cazad v. Chesapeake and Ohio Ry. Co.*, 622 F.2d 72 (4th Cir.1980); *Missouri Pac. R.R. Co. v. International Paper Co.*, 618 F.2d 492 (8th Cir.1980).

[are] not [ ] enough."). Because there is no causal connection between Norfolk's failure to get U.S. Silica to sign the sidetrack agreement and Rogers's injury, Norfolk has not been shown to be negligent.

CONCLUSION

Considering the evidence in the light most favorable to Rogers, the only reasonable inference that can be drawn from the evidence in the record is that there was no negligence on the part of Norfolk. Therefore, the trial court erred in denying Norfolk's motion for judgment notwithstanding the verdict.[10]

For the foregoing reasons, the order of the circuit court is REVERSED.

GOOLSBY and CONNOR, J.J. concur.

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[10] Because of the disposition of the above issue, we find it unnecessary to address Norfolk's remaining issues on appeal.

APPENDIX C

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Case No. 94-CP-20-49

JOHN DAVID ROGERS,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY
AND U.S. SILICA COMPANY,
Defendants.

[May 13, 1997]

ORDER

The above-entitled action was tried during the December 2, 1996 term of Common Pleas Court for Fairifield County. All parties are undoubtedly familiar with the facts of this case, so the Court will dispense with a lengthy recitation. Suffice it to say that after a five day trial, the jury returned a verdict for the Plaintiff, John David Rogers ("Roger[illegible]"), in the amount of three (3) million dollars ($3,000,0[illegible]00). In the verdict form, the jury allocated negligence in the following proportions: Plaintiff-0%; Defendant Norfolk Southern Railway Company-30%; and Defendant U.S. Silica Company-70%.

The issues presently before the Court come via the following post-trial motions by the Defendants:

1) Defendant U.S. Silica's ("U.S. Silica") Motion for Judgment Notwithstanding the Verdict pursuant to South Carolina Rules of Civil Procedure 50, or in the alternative, a motion for a New Trial absolute pursuant to South Carolina Rules of Civil Procedure 59.

2) Defendant Norfolk Southern Railway Company's ("Norfolk Southern") Motion for Judgment Notwithstanding the Verdict, or in the alternative, either Motion for a New Trial Absolute or Motion for a New Trial *nisi remittitur*, AND a motion for a new trial based on the Court's failure to charge its requests numbers 5, 11, 14, 16, 18, 20, 22, 26, and 32.

These matters were argued before the Court in Union, South Carolina on December 11, 1996, with all parties represented by counsel. At that time the Court requested that each party submit proposed orders addressing their respective positions. The last proposed order was finally received on February 25, 1997. After carefully considering these proposed orders, and based on the forgoing, each of the Defendants' motions are hereby respectfully DENIED.

I. U.S. SILICA'S AND NORFOLK SOUTHERN'S MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT

A. U.S. SILICA'S JNOV MOTION

First, U.S. Silica and Norfolk Southern argue that the jury's verdict in this case is contrary to the weight of the evidence and move for Judgment Notwithstanding the Verdict. Specifically, U.S. Silica challenges the sufficiency of the evidence in its exceptions #1 through #8. As the "thirteenth juror" entrusted with the task of ensuring that justice prevails, the Court has the limited authority to grant a new trial upon the facts when the evidence so dictates. *Vinson v. Hartley*, ____S.C.____, ____S.E.2d____ (Ct. App. Opinion No. 2572, Filed October 14, 1996). In ruling on a JNOV motion, the evidence must be considered in the light most favorable to the non-moving party. *Graham v. Whitaker*, 282 S.C. 383, 321 S.E.2d 40 (1984). Applying this standard of review, the instant case does not present an occasion to disrupt the jury's verdict.

First, the Court finds that all questions of fact regarding the alleged negligence of U.S. Silica were properly submitted to the jury. Generally, a landowner owes a

duty to invitees to maintain his premises in a reasonably safe condition, or to at least warn of hidden or latent dangers on his premises. *Pennington v. Zayre Corp.*, 252 S.C. 176, 165 S.E.2d 695 (1969). Viewing the evidence in the light most favorable to Rogers, the Court finds that more than one inference regarding U.S. Silica's breach of this duty could be drawn. Moreover, this Court finds that the verdict itself is wholly consistent with such inferences. Likewise, the nature and extent of Rogers' injuries resulting from the 1993 incident (ie. the aggravating role of Rogers' prior back injuries and his degenerative disc disease), as well as the issue of his contributory negligence, were determinations for the jury. Its subsequent findings are consistent with the evidence. Finally, this Court finds that the verdict does not reflect any discernible confusion on the part of the jury regarding the law of this case. The Court will note that it took great pains to ensure that its instructions were clear and comprehensive. Therefore, this Court finds no merit in exceptions #1 through #8 contained in U.S. Silica's motion.

Nevertheless, the Court would like to take this opportunity to specifically address U.S. Silica's exceptions #2 and #30. In these exceptions, U.S. Silica alleges that the Court erred by submitting the issue of whether or not the "wash-out" was an open and obvious danger to the jury. As noted earlier, a landowner generally has a duty to warn or protect invitees of hidden dangers or conditions on his land of which the landowner knows or could know through the exercise of reasonable care. *Rogers v. Scyphers*, 251 S.C. 128, 161 S.E.2d 81 (1968). In its motion for summary judgment, its motion for directed verdict, and now its motion for a new trial absolute, U.S. Silica argues that the hole, or "wash-out," on its property was an open and obvious defect or condition as a matter of law, and therefore, U.S. Silica had no duty to warn Rogers of such danger. *See Callander v. Charleston Doughnut Corp.*, 406 S.E.2d 361 (S.C. 1991). In *Callander* the Supreme Court adopted the "no duty" rule of Section 343(A)

of the Restatement (Second) of Torts, stating that a landowner has no duty to warn in invitee of conditions on his premises "whose danger is known obvious" to the invitee. One of the touchstone elements of this "no-duty" rule as it has been applied in South Carolina is that the invitee must fully *appreciate* the nature and extent of the danger to which he voluntarily exposes himself. *Senn v. Sun Printing Co.*, 295 S.C. 169, 367 S.E.2d 456 (Ct. App. 1988). To fully appreciate a danger the invitee must have knowledge of the facts constituting the dangerous condition. *Id.*

In the instant case, while the hole itself was undoubtedly open and obvious, the jury could have inferred from all the evidence that the real danger facing Rogers as he approached the hole was the imminent and hidden risk of the ground collapsing under his feet, not falling into the existing hole. U.S. Silica argues that the cautious manner in which Rogers approached the hole (stepping on the railroad ties), as well as his prior experience with washouts, indicate that he fully appreciated this danger. However, the evidence also suggests that Rogers was unaware of the attendant facts constituting the dangerous condition. As the Court recalls, Rogers testified that he had no knowledge concerning the depth of the hole, the presence of water at the bottom, nor how far the erosion extended underneath the track. From all these factors the jury could have inferred that Rogers did not fully appreciate the danger he faced. Therefore, the Court could not conclude as a matter of law that U.S. Silica had no duty to warn Rogers, and the question of whether the hole was an open and obvious danger to which Rogers voluntarily exposed himself was properly submitted to the jury.

For the aforementioned reasons, U.S. Silica's JNOV motion is hereby DENIED.

B. NORFOLK SOUTHERN'S JNOV MOTION

Next, Norfolk Southern also moves for judgment notwithstanding the verdict. Cognizant that Plaintiff's con-

tributory negligence is not a complete defense under FELA, Norfolk Southern initially argues that the only reasonable inference from all the evidence is that Plaintiff's injuries were caused *solely* by his own negligence. As in the case of U.S. Silica's JNOV motion, the Court finds that this determination was a factual matter properly submitted to the jury. For the sake of demonstrating the difficulty with this argument, the Court will point out that even if the jury had found the Plaintiff 99% comparatively negligent, and Norfolk Southern 1%, then Norfolk Southern would still be liable for Plaintiff's damages. 45 U.S.C. §§ 51 and 53. In *Johannessen v. Gulf Trading & Transport Co.*, 633 F.2d 653 (2nd Cir. 1980), the court noted that "it is well established that the role of the jury is significantly greater in FELA cases than in common law negligence actions. The right of the jury to pass upon the question of fault and causation must be most liberally viewed." Given the tenuous degree of fault necessary to establish liability under FELA and the jury's substantial deference in so determining, this Court will not grant Norfolk Southern's JNOV motion based on the argument that Plaintiff's sole negligence caused his injuries.

In the alternative, Norfolk Southern argues that the only reasonable inference to be drawn from all the evidence is that it committed no negligence which proximately caused Plaintiff's injuries. Norfolk Southern contends that it had no knowledge, actual or constructive, that U.S. Silica installed slurry pipes underneath the spur tracks, and that absent such notice it has no duty to ensure they are encased. *See Gallose v. Long Island R.R. Co.*, 878 F.2d 80 (2nd Cir. 1989) ("[a]n employer breaches its duty to provide a safe workplace *only* when it knows or should know of a potential hazard in the workplace, yet fails to exercise reasonable care to inform and protect its employees.").

However, this Court finds ample evidence in the record that suggests Norfolk Southern at least had constructive notice of the slurry pipes underneath the spur tracks at

the U.S. Silica plant. Constructive notice is defined as, "knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the *duty of inquiring into it.*" (emphasis added). The evidence suggests that Norfolk Southern was familiar with the AREA regulations as well as its own guidelines requiring pipes running underneath tracks to be encased. Further, it was surely aware of the nature of U.S. Silica's slurry operations at the West Columbia plant, because Norfolk Southern track supervisors had been called to that facility on prior occasions to inspect the tracks. These facts alone provide a sufficient basis to infer that Norfolk Southern had constructive notice of the presence of slurry pipes underneath the spur tracks at the U.S. Silica plant. Therefore, the jury could infer that Norfolk Southern breached its duty of ordinary care by failing to inquire about the encasement of these pipes. For this reason, the Court finds that the question of Norfolk Southern's negligence in this regard was properly submitted to the jury, and its subsequent findings are consistent with the weight of the evidence.

For the all the aforementioned reasons, Norfolk Southern's motion for JNOV is hereby DENIED.

II. U.S. SILICA'S AND NORFOLK SOUTHERN'S MOTION FOR NEW TRIAL ABSOLUTE BASED ON THE EXCESSIVENESS OF THE VERDICT

Next, U.S. Silica and Norfolk Southern pray for a new trial absolute based on the contention that the jury's determination of damages was grossly excessive under the evidence. Although, the Court has broad discretion in granting a new trial based on the excessiveness of the verdict, it *must* grant the motion if the verdict is so grossly excessive as to "shock the conscience," and clearly indicates that the figure reached was the result of passion, caprice, or prejudice. *Vinson v. Hartley, infra.* A

failure to do so amounts to an abuse of discretion. *Id.* Yet at the same time, the jury's determination of damages is entitled to substantial deference. *McCourt v. Abernathy*, ____S.C.____, 457 S.E.2d 603 (1995).

Although the verdict in this case is quite substantial, the Court finds that it does not "shock the conscience," so the verdict does not necessarily mandate a new trial absolute. Likewise, after balancing this Court's duty to scrutinize the verdict with the jury's traditional role of allocating damages, it is clear the verdict should stand. Under our law, a Plaintiff may recover pecuniary damages for intangibles such as pain and suffering. *Edwards v. Lawton*, 244 S.C. 276, 136 S.E.2d 708 (1964). During the trial of this case, Rogers sought recovery for the following damages: the present value of lost wages, both past and future; the present value of lost fringe benefits, past and future; physical and mental pain and suffering, past and future; medical expenses; and the loss of enjoyment of life resulting from his injuries. The Court's notes of the trial reflect that the Plaintiff's economic expert, Professor Thompson, testified that the present value of Rogers' loss of wages as an Assistant Track Supervisor is $702,472.00. Further, Thompson testified that the present value of Rogers' lost fringe benefits is $347,311. Rogers's medical bills exceeded $30,000.00. Assuming the jury used these figures exclusively in calculating its verdict, Rogers' economic loss totals approximately $1,080,000.00. Therefore, the jury must have calculated Rogers' pain and suffering damages to be roughly $1,990,000.00.

Damages for intangible losses and emotions of course cannot be determined by any fixed measure. *Knoke v. South Carolina Dept. of Parks, Recreation, and Tourism*, ____S.C.____, ____S.E.2d____ (Opinion No. 24514, Filed November 4, 1996). In *Knoke* the Supreme Court upheld the trial court's denial of a motion for a new trial absolute where the jury returned a verdict for $3,000,000.00 and the Plaintiff failed to prove any economic loss. Unlike the Plaintiff in *Knoke*, Rogers presented considerable evi-

dence of his economic loss. Although *Knoke* involved the wrongful death of a child, the case stands for the larger principle that designating a monetary value for intangible damages is a task best left to the jury. *Id.*

Although Rogers was not left paralyzed or disfigured, he has nevertheless suffered greatly from the aggravating injury of 1993. He testified at great length about how he no longer enjoys activities he once participated in like golf, skiing, bowling, and basketball. He testified about constant pain in his lower back, and his inability to sleep. More compellingly, he spoke of his frustrations at not being able to hold his young daughter, as well as the strain his injury has placed on his marriage. The Court finds abundant evidence to support a substantial award of damages. Therefore, the Court cannot in good conscience conclude that the jury's determination of pain and suffering damages was motivated by passion, caprice, or prejudice.

Next, Defendant Norfolk Southern's observations regarding the jury's demeanor toward the Plaintiff, as well as the Clerk of Court's reactions to the reading of the verdict, are well noted. However, this Court cannot conclusively state that such reactions in and of themselves reflect the presence of prejudice, passion, or caprice on the part of the jury. Norfolk Southern cannot point to anything in the record that suggests otherwise. Also, Norfolk Southern attaches some significance to the fact that during the settlement negotiations, facilitated and encouraged by this Court, Rogers expressed some willingness to settle the case for $400,000. Norfolk Southern reasons that the verdict of $3,000,000 is so far beyond the Plaintiff's own expectations for a reasonable recovery that this Court must conclude that it "shocks the conscience." However, this Court is unwilling to draw such a conclusion. The settlement negotiations between the parties are totally irrelevant to the trial of the case on the merits and the jury's subsequent determination of damages. Finally, Norfolk Southern contends that the brevity of the jury's

deliberations (approximately 50 minutes) is evidence of prejudice, passion, and caprice. The Court cannot impute any prejudice, passion, or caprice to the length of the jury's deliberations. The Court will note that the jury remained attentive and conscientious throughout the trial. The Court is quite satisfied that the jury carefully and diligently considered the issues presented.

For these reasons, the Defendants' motions for new trial absolute based on the excessiveness of the verdict is DENIED.

III. DEFENDANT NORFOLK SOUTHERN'S MOTION FOR A NEW TRIAL *NISI REMITTITUR*

In the alternative to its motions for JNOV and new trial absolute, Norfolk Southern moves for a new trial *nisi remittitur*. Under this device, the trial judge may grant a new trial based on a determination that the verdict is unduly liberal, unless the Plaintiff agrees to a reduction of the verdict. *Jones v. Ingles Supermarket, Inc.*, 293 S.C. 490, 361 S.E.2d 775 (Ct. App. 1987). While this procedure does not allow the trial judge to unilaterally substitute his judgment for that of the jury, it gives the Plaintiff the option of either electing the remittitur suggested by the trial judge, or the granting of a new trial on the merits. *Id.* As the Court in *Vinson* pointed out, compelling reasons must be given to justify the granting of a new trial *nisi remittitur*. *infra*. Due to the trial judges familiarity with the evidentiary atmosphere, appellate courts extend great deference to a judge's decision not to remit a verdict, especially in the area of intangible elements of damages. *Rush v. Blanchard*, 310 S.C. 375, 426 S.E.2d 802 (1993).

After carefully considering the issue, the Court cannot fathom any compelling reasons to grant Norfolk Southern's motion. It cannot in good conscience disturb the jury's findings of damages for many of the same reasons stated earlier. Albeit quite a large verdict, the Court does not believe that it is unduly liberal to the extent that war-

rants a new trial *nisi remittitur*. Norfolk Southern proposes that the verdict be remitted to $500,000. Such a substantial remittitur, a 500% reduction, is clearly tantamount to simply saying the verdict shocks the conscience. In other words, if the Court were inclined to remit the verdict that much, then it certainly would be obligated to simply grant a new trial absolute. Because this Court is extremely reluctant to usurp the province of the jury in awarding damages, Norfolk Southern's motion for an new trial *nisi remittitur* is DENIED.

IV. NORFOLK SOUTHERN'S MOTION FOR A NEW TRIAL BASED ON COURT'S FAILURE TO CHARGE ITS REQUESTS

Finally, Norfolk Southern moves for a new trial, alleging the Court erred in not charging its Requests to Charge numbers 5, 11, 14, 16, 18, 20, 22, 26, and 32. To warrant a new trial based on the failure or refusal to give a requested jury instruction, the moving party must show that such refusal or failure was not only erroneous, but prejudicial as well. *Sherer v. James*, 286 S.C. 304, 334 S.E.2d 283 (Ct. App. 1985), rev'd on other grounds, 290 S.C. 404, 351 S.E.2d 148 (1986). Further, failure to give a properly requested charge is not error if the Court's general instructions are sufficiently broad to enable the jury to understand the law and the issues involved. *Waldrup v. Metropolitan Life Ins. Co.*, 274 S.C. 344, 263 S.E.2d 652 (1980).

First, other than a general allegation of prejudice, Norfolk Southern does not specifically show how the failure to charge each of its requests resulted in prejudice; therefore, the Court will not grant a new trial on this ground.

Nevertheless, in all fairness to Norfolk Southern, the Court has reviewed *sua sponte* the requests at issue and must conclude that its general instructions to the jury substantially addressed the issues raised in the disputed requests to charge. First, requests to charge #5, #16, #18, and #32 basically reiterate that a railroad is not an

insurer of an employee's safety, and as such, it must only protect its employees from dangers of which it knows or should know. This point was adequately covered by the Court's general instructions on the standard of care applicable to Norfolk Southern. Second, #11 deals with income taxes on damage awards, which the Court found to be wholly inappropriate and irrelevant. Third, #14 essentially states that FELA *presumes* that a railroad is unaware of defects or dangers on the land of another. The Court believes that such an absolute proposition must have been taken out of the context of its cited authority. Because of its questionable validity, it was properly not charged. Fourth, Requests to Charge #20 and #22 were covered by the Court's general instructions on damages. Last, #25 is a charge on "accident." The Court finds no prejudice in the failure to charge this request because the legal concept of accident is inherent in the Court's charge on foreseeability and causation. Further, the evidence presented simply did not support an independent charge on accident. *See McBeth v. TNS Mills, Inc.*, ____S.C.____, 458 S.E.2d 52 (Ct.App. 1995) (court must only charge the jury on the applicable law as raised by the pleadings and supported by the evidence).

For these reasons, Norfolk Southern's motion for a new trial based on the failure to charge the aforementioned requests is hereby DENIED.

V. U.S. SILICA'S MOTION FOR NEW TRIAL BASED ON REMAINING ALLEGATIONS OF ERROR

Defendant U.S. Silica, as noted earlier, alleges 30 errors of law committed by this Court in furtherance of its demand for a new trial absolute. U.S. Silica's exceptions #1 through #8 regarding the sufficiency of the evidence have already been addressed in consideration of its motion for Judgment Notwithstanding the Verdict. The remaining allegations of error support U.S. Silica's motion for a new trial absolute. Under the harmless error standard con-

tained in South Carolina Rules of Civil Procedure Rule 61, this Court cannot grant a new trial absolute based on errors in the admission or exclusion of evidence or defect in any ruling unless a refusal to take such action appears to be "inconsistent with substantial justice." Applying this standard, the Court concludes that the alleged errors, even if true, do not warrant a new trial at this juncture. U.S. Silica has failed to show how these alleged errors have immediately affected their substantial rights. Nevertheless, the Court will take the opportunity to address each of U.S. Silica's exceptions.

A. EXCEPTION #9

In exception #9 U.S. Silica alleges the Court erred in not severing Rogers's negligence cause of action against Norfolk Southern under the Federal Employees Liability Act (FELA) and his premises liability claim against U.S. Silica. This issue was thoroughly argued before the trial commenced. At that time counsel for U.S. Silica argued that failing to sever the claims would prejudice U.S. Silica because of the different standards of proof and elements of causation necessary to establish a claim under FELA and those of common law negligence in a premises liability case.

The issue of whether or not a FELA claim and a common law claim may be properly tried together was addressed in *Earwood v. Norfolk Southern Railway Company*, 845 F. Supp. 880 (N.D. Ga. 1993). In *Earwood* the District Court held that a FELA action and a negligence action could be tried together. The Court expressed its confidence that it could adequately instruct the jury on the nuances between the two causes of action, as well as the jury's ability to comprehend and consider the issues. Likewise in the instant case, this Court believes that the jury in this case was very capable of understanding the issues presented. Further, the Court is confident that its instructions to the jury were clear and correct statements of the applicable law. As noted earlier, the Court went to great lengths to ensure this.

In addition, severing the claims would have frustrated the interests of judicial economy. Requiring separate trials on claims arising from the same set of operative facts would be unnecessarily duplicative and a waste of judicial resources. Finally and most importantly, severing the FELA claim from the common law claim would have had a greater likelihood of resulting in prejudice to the Plaintiff than either of the Defendants. As the court in *Earwood* explained, if the claims had been severed, and separate trials conducted, then the absent potential tortfeasors in the respective trials could be found primarily liable, thus allowing the plaintiff to recover nothing. For these reasons the Court finds that it properly exercised its discretion under SCRCP Rule 42 not to sever the claims; therefore, a new trial on this exception is denied.

B. EXCEPTION #10

Exception #10 relates to the very crux of this case. Therefore, a little background is in order here. First, it is undisputed from all the evidence presented in this case that the wash-out which led to Rogers injury was caused by high velocity water erosion from a ruptured slurry pipe running underneath U.S. Silica's tracks. Further, it is virtually undisputed that slurry pipes running underneath railroad tracks should be encased by an outer pipe to prevent such erosion in the event of a rupture. Therefore, a basic issue in this case becomes: Who is responsible for encasing the slurry pipes?

Exception #10 contends that evidence of any alleged negligence committed by U.S. Silica regarding the failure to encase the slurry pipes was irrelevant because the danger surrounding the wash-out was open and obvious. For the same reason, U.S. Silica also objected to evidence of its alleged negligence in repairing a similar washout underneath the tracks in question on the Saturday before Rogers' injury. However, these contentions necessarily fail if the dangerous condition was not open and obvious, which, as discussed *infra*, was an issue properly submitted to the jury.

Further, as discussed earlier with regard to U.S. Silica's JNOV motion, it is elementary that a landowner may be held liable for dangers on his premises of which he either has knowledge, has created through his operations, or could discover through the exercise of reasonable care. *H.L. Green Co. v. Bowen*, 223 F.2d 523 (4th Cir. 1955); *Mullen v. Winn-Dixie Stores, Inc.*, 252 F.2d 232 (4th Cir. 1958). Because U.S. Silica clearly owes invitees a duty to maintain its premises in a reasonably safe condition, *Pennington v. Zayre Corp., infra*, evidence of a breach of this duty is undoubtedly admissible. Surely, U.S. Silica does not contend otherwise.

Rather based in part on U.S. Silica's previous arguments, it appears to this Court that the real theory behind exception #10 is that U.S. Silica's duty to Rogers as an invitee is somehow extinguished, superseded, or encompassed, by Norfolk Southern's nondelegable duty under FELA to provide its employees with a safe place to work. From this premise U.S. Silica reasons that the *only* duty it owed Rogers, *if any*, was to simply *warn* Rogers of the washout. They argue that its alleged negligence in failing to encase, or adequately repair the slurry pipes is therefore irrelevant, and highly prejudicial to the issue of whether U.S. Silica breached its sole duty to warn. In its proposed order, U.S. Silica cites *Payne v. B&O Railroad Co*, 300 F.2d 546 (6th Cir. 1962), for the broad proposition that a railroad cannot escape liability when its employee is injured from an unsafe condition on premises it does not own, control, or maintain, and the existence of such condition is caused solely by the negligence of a third-party. In other words, U.S. Silica essentially argues that Norfolk Southern's nondelegable duty makes it vicariously, and therefore strictly liable, for any negligence committed by U.S. Silica.

However, such an application of the nondelegable duty rule is clearly erroneous, because it would render FELA a pure, no-fault system akin to worker's compensation laws, which is clearly contrary to the intent of the Supreme

Court and Congress. *See Fashauer v. Nw Jersey transit Rail Corp.*, 57 F.3d 1269 (3rd Cir. 1995) ("FELA is neither a worker's compensation statute nor a strict liability statute, and absent explicit direction from Congress or the Supreme Court, we decline to turn it into one."). Moreover, this reasoning perverts the common law duty of a premises owner to an invitee by making its application entirely contingent upon the invitee's employer. In other words, a landowner frequented mostly by invitees subject to FELA would be exempt from liability, and essentially free to maintain his premises in a dangerous condition under U.S. Silica's interpretation. This clearly thwarts the sound policy of encouraging landowners to maintain their premises in a reasonably safe condition for all invitees.

Rather, an appropriate application of the nondelegable duty rule provides that the sole negligence of a third-party premises owner *may* be imputed to the railroad, but not *necessarily* so, as U.S. Silica argues. *See Dulasky v. Consolidated Rail Corporation*, 1990 WL 134848 (N.D.N.Y.). Instances where a railroad may be held liable for the negligence of a third-party include the scenario where the third-party is an agent of the railroad, *See Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326 (1958), or where the third-party is bound by a contract with the railroad, *See Carney v. Pittsburgh & Lake Erie R.R. Co.*, 316 F.2d 277 (3rd Cir.), cert. denied, 375 U.S. 814 (1963). Because the relationship between U.S. Silica and Norfolk Southern at the time in question does not warrant strictly imputing any negligence of U.S. Silica to Norfolk Southern, the Court can discern no further basis for exception #10. Therefore, all evidence probative of U.S. Silica's negligence in causing and/or failing to adequately repair the washout in breach of its duty to Rogers as an invitee was properly admitted.

C. EXCEPTIONS #11-#14

In Exceptions #11-#14 U.S. Silica alleges that the Court erred in allowing Plaintiff's expert, Ronald Dunn, to tes-

tify about American Railway Engineers Association ("AREA") guidelines and regulations regarding the encasing of pipes running underneath railroad tracks. U.S. Silica contends that the Court should have included a limiting instruction to the effect that such evidence must be considered only in regard to the FELA claim against Norfolk Southern. The Court does not have the benefit of a complete record of this case, but as it recalls from its notes, U.S. Silica never requested such a limiting instruction. Therefore, if a limiting instruction was not requested, then the Court considers this exception not preserved for consideration in U.S. Silica's motion for a new trial.

Assuming that U.S. Silica did request such an instruction, the Court concedes that it probably should have granted the request. However, the Court finds that failing to do so caused no prejudice to U.S. Silica. The AREA regulations in conjunction with the records dealing with the unsigned side-track agreement were admitted for the purpose of showing that Norfolk Southern took reasonable action to comply with its nondelegable duty to provide Rogers with a safe place to work. Such evidence was not necessarily admitted for the purpose of pointing liability for the wash-out toward U.S. Silica. The Court cannot see how a failure to include a limiting instruction on the admission of the AREA regulations prejudices U.S. Silica, especially in light of Ronald Dunn's own testimony on cross examination that such regulations had no application to U.S. Silica.

D. EXCEPTIONS #15-#19

Exceptions #15 alleges error in not allowing Dr. Ralph Owings to testify that Norfolk Southern's Director of Medical Services committed malpractice by returning Rogers to work in his same capacity after Plaintiff's 1989 back injury. The Court properly excluded such testimony because it obviously calls for a legal conclusion which Doctor Owings was not qualified to make. Similarly, testimony from Dr. Owings to the effect that returning Rogers

to work after 1989 was at least "bad judgment," was properly not allowed because it involves an opinion on an issue which does not require an expert. The jury was quite capable of drawing such a conclusion from Dr. Owings' testimony.

Next, exceptions #16-#19 essentially allege error in not admitting Plaintiff's actual claim against Norfolk Southern (U.S. Silica's exhibit 5 for identification), for his prior back injury as evidence of Norfolk Southern's negligence in returning Rogers to work in his same capacity, and Rogers' own contributory negligence in returning to work. The Court found that the risk of prejudice from the admission of exhibit 5 for identification far outweighed any probative value. However, as the Court recalls, it provided ample opportunity for U.S. Silica to pursue its theory without admitting exhibit 5. For example, during U.S. Silica's cross-examination of Rogers, the Court allowed counsel to elicit that Rogers settled claims against Norfolk Southern for prior back injuries suffered in 1985 and 1989. Further, the Court granted U.S. Silica considerable leave to inquire about the extent of Rogers' prior back injuries on its cross-examination of Dr. Owings. Rogers himself admitted he made a claim against Norfolk Southern for his prior injury, so it was not necessary or proper to smuggle the contents of exhibit 5 for identification into evidence. Similarly, it was not proper to do so under the guise of refreshed recollection. Such tactics can only be viewed as an attempt to inflame the jury. Therefore, U.S. Silica's Exhibit 5 for identification was properly excluded pursuant to Rule 403.

E. EXCEPTIONS #20

In Exception #20 U.S. Silica alleges that the Court erred in failing to exclude the testimony of its former plant manager, George Foster, whose testimony was procured by counsel for Plaintiff and Norfolk Southern contrary to the ethical rules governing contact with former employees of an adverse corporate party. The Court has read S.C. Bar Ethics Advisory Opinion 94-25 and con-

cludes that it only prohibits contact with former employees of an adverse corporate party when the employees actions can be imputed to the corporation, or when the employee's actions are the subject of the representation. In the present case, George Foster was not an officer or a member of the board of directors of U.S. Silica, so his actions are not strictly imputable to U.S. Silica. George Foster only testified that *he* was aware of the AREA regulation requiring slurry pipes to be encased. Moreover, George Foster's acts or omissions as plant manager are not the subject of this lawsuit. No one has alleged that he was responsible for ensuring that the slurry pipes underneath the spur tracks were encased.

Irrespective of these considerations, however, the Court finds that the exclusion of relevant evidence absent a clear or egregious violation of ethics rules in obtaining such evidence is not a proper remedy. It is not this Court's province to determine whether or not counsel for Plaintiff and Norfolk Southern violated ethical rules. The court suggests that counsel for U.S. Silica address this matter to the Bar Ethics Committee if he is sufficiently outraged by his opposing counsels' conduct.

F. EXCEPTION # 21

In exception #21 U.S. Silica further alleges error in the admission of Norfolk Southern's exhibits 1-9 on the grounds that the grounds that they constitute hearsay correspondence between U.S. Silica's and Norfolk Southern's predecessors from 1969 to 1980. These letters discussed negotiations on a "side track agreement" between the two preceding entities. After concluding that these documents were relevant for the purpose of showing that Norfolk Southern took reasonable care to comply with its duty to provide a safe work place and not unduly prejudicial to either the Plaintiff or U.S. Silica, the Court admitted them into evidence under the business record exception to the hearsay rule. S.C. R. Evid. 803(6). Although U.S. Silica's proposed order does not elaborate on its objection to this evidence on hearsay grounds, the only con-

ceivable hearsay objection this Court can discern is that some of the records admitted during Norfolk Southern's case were not actually prepared by Norfolk Southern in the ordinary course of its business. Some of the letters in Norfolk Southern's files were prepared by U.S. Silica's predecessor. However, these records were admitted because the series of correspondence from U.S. Silica's predecessor was necessary to Norfolk Southern and its predecessor in making business decisions on the side track agreement. *Cf. Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct. App. 1987) (bank required a copy of purchase order for equipment in making its decision to grant a loan). Thus, exception 21 does not necessitate the granting of a new trial.

G. EXCEPTIONS #22-#26

The errors alleged in exceptions #22-#26 present the most troubling aspects of the procedural posture of this trial. Therefore, these points deserve more careful consideration. Generally, exceptions #22-#26 address the manner in which this case was submitted to the jury. Specifically, exceptions #22 and #23 reargue the point made earlier about the danger of confusion regarding the Court's charge to the jury.

The formulation of jury instructions is within the sound discretion of the court, and a verdict will not be disturbed based on such formulation as long as the instructions as a whole are fair and accurate statements of the law. *Voelker v. Frederick Business Properties Co.*, 465 S.E.2d 246, 195 W.Va. 246 (1995). As mentioned earlier, the Court made a meticulous effort to ensure that the jury understood the different standards of proof and causation by either charging the law applicable to each defendant separately, or when charging a specific point of law applicable to only one defendant, including a disclaimer stating that particular point was not to be considered in regard to the other defendant.

Also, the verdict form itself reflects the lesser showing for causation necessary under FELA by reading, "Do you find that DEFENDANT, NORFOLK SOUTHERN'S, negligence was *a cause* of Plaintiff's injuries?" (emphasis added). On the other hand, the question of causation with regard to U.S. Silica specifies "proximate cause." The Court cannot conceive of any better method of stressing the differences in causation applicable to each defendant. The jury never requested clarification on any points of law, so the Court must conclude that its instructions were clear.

Next, exception #24 contends that the Court erred by submitting Plaintiff's FELA claim against Norfolk Southern and his common law premises liability claim against U.S. Silica to the jury as one cause of action. U.S. Silica contends that each claim represents two distinct causes of action even though they arose out of the same incident, were plead together in the same complaint, and allegedly concurred to cause one injury. Initially, the term "cause of action" is not amenable to a precise or inclusive definition. *See generally* 1A C.J.S. Actions Section 21(a) 1985. Traditionally, a cause of action has been defined in South Carolina as a right of the Plaintiff, a corresponding duty of the Defendant, coupled with a wrong by the Defendant in breach of such right and duty. *See Landvest Associates v. Owens*, 276 S.C. 22 at 24, 274 S.E.2d 433 at 434 (1981); *Harth v. United Insurance Co.*, 266 S.C. 1 at 5, 221 S.E.2d 102 at 104 (1975).

Applying these principles to the present case, the Court is not convinced that Rogers' action pursuant to FELA is substantially distinguishable from his premises liability claim in fact[1] or in law. It is clear that the primary right Rogers seeks to enforce in both actions is the recovery of damages. *See e.g. Glenn v. E.I. DuPont de Nemours & Co.*, 250 S.C. 323, S.E.2d. (1965). Next, each defendant

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[1] Regarding the facts, it is undisputed that both claims arose out of the same incident.

owed Rogers essentially the same duty (ie. U.S. Silica's duty to maintain its premises in a reasonably safe condition and Norfolk Southern's duty to provide its employees with a safe place to work).[2] *See e.g. Id.* Finally, the Plaintiff alleged that each defendant's breach of duty, or wrongs, concurred to cause a single injury. *See e.g. Id.*

Furthermore, the applicable law in this case is consistent with one negligence cause of action. Other than the federal common law interests embodied in the lesser showing of causation necessary to establish liability under FELA, the claims essentially sound in negligence.[3] Both actions still share the elements of common law negligence: 1) existence of a duty, 2) breach of duty, 3) causation, and 4) damages. Further, the Court concludes that the burden of proof regarding causation is not a substantive distinction, but rather a procedural one. The distinction merely refers to the *quantum* of proof a Plaintiff must present to sustain his burden. *See Dulasky, infra* at 5.

As the Court stated in *Glenn*, "[l]ogically, every wrong furnishes itself a cause of action, but different wrongs may be so blended as to be called a single wrong, as to furnish but one cause of action . . ." *Id.* quoting *Floyd v. C.I.T. Corp.*, 191 S.C. 518, 5 S.E.2d 299. This Court finds that Rogers' action pursuant to FELA and the premises

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[2] U.S. Silica undoubtedly disputes this contention, arguing that the duties owed by itself and Norfolk Southern are distinct, and therefore provide separate grounds for liability. Ordinarily this contention may be correct, but in this case Roger's workplace in the scope of his employment with Norfolk Southern just happened to also be U.S. Silica's premises.

[3] "Under FELA the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the *slightest*, in producing the injury . . ." *Dulasky v. Consolidated Rail Corp.*, 1990 WL 134848 (N.D.N.Y. 1990), quoting 352 U.S. at 506, (emphasis added). The court in *Dulasky* notes that the adjective "slightest" only applies to the element of causation. The quantum of proof necessary for the other elements of negligence – duty, breach, and foreseeability – remain unchanged by this language.

liability action involve blended, inseparable questions of law and fact. While each cause of action may technically provide a separate basis for liability, they are not distinguishable to the extent that prejudice to any party and/or confusion on the part of the jury *necessarily* resulted from submitting the case as one cause of action on a single verdict form. Indeed, the Court believes that this case essentially presents the classic case in which a Plaintiff alleges that the negligence of two tortfeasors concurred to cause his injury. Moreover, the Court finds that its charge to the jury adequately preserved all federal rights and burdens secured by FELA, and limited their application solely to Norfolk Southern.[4]

Next, in exceptions #25 and #26 U.S. Silica alleges that the Court erred in submitting a forms of verdict that required the jury to compare the relative fault between all the parties in contradiction of *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991), and S.C. Code Ann. § 15-38-10, *et seq.* – The Contribution Among Joint Tortfeasors Act. Initially, U.S. Silica is correct in its assertion that *Nelson* and its progeny do not specifically provide for a comparison of fault between all the parties in an action. Rather, *Nelson* states, "[i]f there is more than one defendant, the plaintiff's negligence shall be compared to the *combined negligence* of all defendants." (emphasis added) *Nelson* at 245, 399 S.E.2d at 784.

However, the Supreme Court implicitly approved of a forms of verdict that allowed the jury to compare fault between the all parties in *Southeastern Freight Lines v. City of Hartsville*, ____S.C.____, 443 S.E.2d 395 (1994). In that case, the defendant in a wrongful death action settled

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[4] Additionally, the Court will note that it submitted this case to the jury as one cause of action, in part, to avoid possible prejudice to the defendants. For example, if the Court had presented a separate verdict form for each claim, then the jury might believe that it could find for either Norfolk Southern or U.S. Silica, but not both. Alternatively, the jury could also believe that it may return a verdict against one defendant or the other, but not both.

Plaintiff's claim against it for $400,000, and subsequently brought a contribution action against the city and the state on the grounds that failure to place proper warning signs at the fatal intersection was a contributing proximate cause of death. Judge Anderson submitted a form of verdict in which the jury apportioned liability as follows: Claimant-70%, City-20%, and State-10%. The Court then amended the verdict to conform with the Contribution Act.

Although *City of Hartsville* was a contribution action brought to determine fault between the *tortfeasors only*, the practice of allowing the jury to apportion fault between a plaintiff and multiple defendants is analogous.[5] At the trial level, the sole issue in *City of Hartsville* was whether or not the city's and/or the state's negligence, if any, was a proximate cause of the Plaintiff's death. If so, then according to the doctrine of joint and several liability and § 15-38-20(B) of the Contribution Among Joint Tortfeasors Act, each tortfeasor is liable for their pro rata share of the damages. Further, § 15-38-30 states, "In determining pro rata share of the tortfeasors in the entire liability (1) *their relative degrees of fault shall not be considered" et seq.* (emphasis added). Reading these sections together yields the inescapable conclusion that "pro rata share" must actually mean *per capita* share. Therefore, in *City of Hartsville* the percentages of negligence among the tortfeasors allocated by the jury was irrelevant to a determination of *per capita* share and did not yield a legal result contrary to § 15-38-20(B). Judge Anderson could have just asked the jury with regard to each alleged tortfeasor, "Was the negligence of the governmental entity the proximate cause of Plaintiff's death?" However, Judge Anderson evidently believed that from a layper-

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[5] The issue on appeal in *City of Hartsville* dealt with conflicting provisions between the Contribution Among Joint Tortfeasors Act and the Torts Claims Act, and not the manner in which the trial judge submitted the issue to the jury.

son's perspective he chose the simplest method of submitting the issue to the jury.

Likewise, this Court finds that given the Plaintiff's allegation in the instant case that Norfolk Southern's and U.S. Silica's negligence concurred to cause his injuries, it properly allowed the jury to allocate fault between all the parties. The Court can discern no prejudice to U.S. Silica from this procedure. The interrogatories in the verdict form required the jury to make a finding on Plaintiff's contributory negligence in accordance with *Nelson*. The jury attributed 0% negligence to Rogers. Presumably this determination would have been the same even if the question of Rogers' contributory negligence had been presented separately with regard to each defendant.

Furthermore, requiring the jury to make a finding on Plaintiff's contributory negligence still effectively eliminated the danger of a verdict against U.S. Silica based on an erroneous application of 45 U.S.C. §§ 51 and 53. Section 51 of the FELA abolishes the absolute defense of contributory negligence, while § 53 imposes full liability upon a railroad for its employees injuries due "*in whole or in part*" to its negligence. (emphasis added). The forms of verdict explicitly stated that it was proper to allocate 0% negligence to any party. Because the jury allocated 70% of the negligence in the case to U.S. Silica, it clearly did not apply FELA's "slight negligence" standard in its verdict against U.S. Silica.

Finally, nothing in FELA prevents a railroad from sharing liability for injuries caused by its negligence and the concurring negligence of a third-party. Thus, in accordance with the doctrine of joint and several liability that still prevails in South Carolina, the verdict in this case only means that U.S. Silica and Norfolk Southern are each liable for their unlimited pro rata share of the $3 million. *The verdict does not mean that U.S. Silica is responsible for 70% of the verdict, while Norfolk Southern must only pay 30%.* Such allocations of negligence are merely advisory in nature and do not alter the application

of the Joint Tortfeasor Act. Once judgment has been entered, Rogers may collect from either U.S. Silica or Norfolk Southern, or both. In the event that Rogers collects his entire damages from one of the defendants, the Court may entertain a motion for contribution pursuant to § 15-38-40(B).

H. EXCEPTIONS #28-#29

Finally, in exceptions #28 and #29 U.S. Silica alleges that the Court erred by not charging the law of assumption of the risk as a complete defense to Rogers' allegations of negligence against U.S. Silica. In the alternative U.S. Silica argues that if not a complete defense, the Court should have at least charged assumption of the risk regarding the existence or nonexistence of its duty to warn Rogers of an open and obvious danger. At the trial, the Court struck both Defendant's assumption of the risk defenses, and ruled that assumption of the risk no longer exists *per se* in the wake of *Nelson*. The Court ruled that assumption of the risk was not a total bar to Plaintiff's recovery, and that the larger penumbra of comparative negligence encompasses assumption of the risk. *See* F. Patrick Hubbard and Robert L. Felix, *Comparative Negligence in South Carolina: Implementing Nelson v. Concrete Supply Co.*, 43 S.C. L. Rev. 273 at 289. The Court further advised counsel for Norfolk Southern and U.S. Silica that they could essentially argue assumption of the risk without invoking it by name in regard to their theory that the Plaintiff voluntarily exposed himself to an open and obvious danger. Moreover, the Court included instructions to the effect that a Plaintiff may be contributorily negligent if he voluntarily exposes himself to an obvious danger. For these reasons, the Court finds no merit in U.S. Silica's exceptions #28 and #29.[6]

---

[6] Although not determinative here, it is interesting to note that in *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, Opinion No. 2621 (Davis advance Sheets #2) the Court of Appeals *en*

CONCLUSION

For all of the aforementioned reasons, U.S. Silica's and Norfolk Southern's post-trial motions are hereby DENIED. Therefore, judgement in this case shall be entered for the Plaintiff, John David Rogers, in the amount of three million dollars ($3,000,000).

IT IS SO ORDERED!

/s/ PAUL E. SHORT, JR.
Paul E. Short, Jr.
Presiding Judge

13th day of May 1997

---

banc held that assumption of the risk is no longer a complete defense, and that it is merely one facet of comparative negligence.

APPENDIX D

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Case No. 94-CP-20-49

JOHN DAVID ROGERS,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY
AND U.S. SILICA COMPANY,
Defendants.

FORMS OF VERDICT

All answers must be unanimous. All jurors must agree before an answer is entered.

1. Was the Defendant, Norfolk Southern, negligent?

   YES__√__ NO_____

   If your answer is "no,' proceed to Question 3.

   If your answer is "yes" go to Question 2.

2. Was the Defendant's, Norfolk Southern's, negligence a cause of the Plaintiff's injuries?

   YES__√__ NO_____

   If your answer is "no,' proceed to Question 3.

   If your answer is "yes" go to Question 3.

3. Was the Defendant, U.S. Silica Company, negligent?

YES__√__ NO_____

If your answer is "no," proceed to Question 5.

If your answer is "yes," go to Question 4.

4. Was the Defendant's, U.S. Silica Company's, negligence a proximate cause the Plaintiff's injuries?

YES__√__ NO_____

If your answer is "no," proceed to Question 5.

If your answer is "yes," go to Question 5.

5. Was the Plaintiff, John D. Roger's, negligent?

YES_____ NO__√__.

If your answer is "no," proceed to Question 7.

If your answer is "yes," go to Question 6.

6. Was the Plaintiff's, John D. Roger's, negligence a proximate cause of his own injuries?

If your answer is "no," proceed to Question 7.

If your answer is "yes," go to Question 7.

7. The entire negligence of the parties in this case must be allocated between the Plaintiff and the Defendants. It is not required that each party be allocated a percentage of negligence. It is perfectly acceptable to attribute 0% negligence to any party. Therefore, what percentage of negligence, if any, was the Plaintiff's, and what percentage of negligence was each Defendant's?

Plaintiff, John D. Rogers	0 %
Defendant, Norfolk Southern	30 %
Defendant, Norfolk Southern	70 %

Total must equal 100%

Proceed to Question 8.

8. What is the full dollar amount of the damages sustained by the Plaintiff, John D. Rogers? [Write the amount in both words and numbers.]

   $ 3,000,000.00 [numbers]

   Three Million & no/100 ~~~~~~~~ [words]

December 6, 1996 /s/ Tracey B. Gantt
Forelady

After the verdict form is completed and signed by the Forelady, please report to the Court.

STATE OF SOUTH CAROLINA
COUNTY OF Fairfield

JUDGMENT IN A CIVIL CASE

JR# 21,226

IN THE COURT OF COMMON PLEAS

CASE NO. 94-CP-20-49

John D. Rogers

Norfolk Southern Railway Co and

U.S. Silica Company

PLAINTIFF(S)

DEFENDANT(S)

52a

CHECK ONE:

[X] JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

[ ] DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[ ] ACTION DISMISSED (CHECK REASON): [ ]Rule 12(b), SCRCP; [ ]Rule 41(a), SCRCP (Vol. Nonsuit); [ ] Rule 43(k), SCRCP (Settled); [ ]Other- _____

[ ] ACTION STRICKEN (CHECK REASON): [ ]Rule 40(j) SCRCP; [ ]Bankruptcy; [ ]Other-_____

IT IS ORDERED AND ADJUDGED: [ ]See attached order; [ ]Statement of Judgment by the Court:

See attached jury verdict

Dated at Winnsboro, South Carolina, this 6th day of December 19 96.

Dorcas C. Anderson
Clerk of Court

This Judgment was entered on the 9th day of December, 19 96, and a copy mailed first class this 9th day of December, 19 96 to attorneys of record or to parties (when appearing pro se) as follows:

Robert McKenzie	William Tucker	John C. McMaster	Ronald Boston
P.O. Box 58	505 N. 20th St Suite 1700	P.O. Box 7337	P.O. Box 1473
Columbia, S.C 29202	Birmingham, AL. 35203	Columbia, S.C 29202	Columbia, S.C 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Dorcas Anderson
CLERK OF COURT

SCRCT FORM 4
(Rev. 2/96)

BEST AVAILABLE COPY

APPENDIX E

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

Case No. 94-CP-20-49

JOHN DAVID ROGERS,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY
AND U.S. SILICA COMPANY,
Defendants.

TRANSCRIPT OF RECORD
(December 2-6, 1996)

Before: The Honorable Paul E. Short, Jr., Judge and a Jury

* * *

[Testimony of James Ellis Gentry, Tr. 154, R. 87]

* * *

[Tr. 156, R. 89]

* * *

Q. I am going to show you what has been marked, offered and admitted as Plaintiff's Exhibit 6. Do you recognize that?

A. Yes, sir.

Q. And what is that?

A. That's the back corner of the wet process building eight and nine pumps.

Q. Show the ladies and gentlemen where the eight and nine pumps are.

A. That's them right there, that's eight and nine.

Q. What do they do?

A. They pump coarse sand into the stack.

Q. And does the line go out from eight and nine pumps generally along under where that book is in the middle of the track?

A. It runs out that way, but where I don't know.

Q. Okay, when this eight and nine pump line that you talk about is that the Nypak plastic line?

[Tr. 157, R. 90]

A. Yes, sir.

Q. Have you ever seen that line yourself?

A. I've seen where it comes out of the ground on over as it comes up out of the ground, then I can see it.

Q. Over here?

A. Yes, it's exposed.

* * *

[Tr. 181, R. 114]

* * *

Q. And one thing to make clear, Mr. Gentry, the eight and nine that we are speaking of – would you step down here, please, sir – the eight and nine line out at U.S. Silica is a line that runs from the pumps and the line goes underground here –

A. Yes, sir.

Q. – and runs in a straight line out towards the cyclone they call it or a big sand pile out here where sand is stored?

A. Yes, it runs out in that direction. Right there's part of it.

[Tr. 182, R. 115]

Q. Okay, I was going to ask you that. It runs underground and then in the lower left hand portion of Exhibit Number 1 do you actually see the eight and nine line?

A. Yes, sir.

Q. And is it then visible all the way to the sand pile?

A. Yes, sir, right up to where you get to the top of it, a little bit is under and then it comes back out.

Q. Where sand is pouring out of it, but the line actually runs exposed out and up over and is that roughly a quarter of a mile?

A. Yes, sir.

Q. And that is all Nypak?

A. As far as I know.

Q. What has been referred to as plastic, is that correct?

A. Yes, sir.

Q. Is that a very, very heavy line?

A. Yes, sir.

Q. And the wearing out of the line and you may take your seat – when you talk about the sand and slurry I think it's clear going through the line it is a certain percentage of water and a certain percentage of sand –

A. Yes, sir.

Q. – and by the very nature of what the pipes do and what they perform over a period of time they wear out in that fashion developing holes?

A. Yes, sir.

* * *

[Testimony of James Willard Holmes, Tr. 188, R. 121]

* * *

[Tr. 197, R. 130]

* * *

Q. And when it runs under the railroad track if it is cased if the slurry pipe broke, the casing is there to protect the track and run the product out away from it, so

that it doesn't undermine the track or come up through the track, is that right?

[sidebar omitted]

* * *

[Tr. 198, R. 131]

* * *

A. The question, let me see if I understand the question, it is why do we have this encased, is that the question?

Q. I want to find out the effect of it. We will start with why.

A. The reason we had it encased is because this mine line is operated anywhere from, you know, roughly sixty hours a week. So it's a high use line and it is run frequently and there was also, you know, kind of a sharp turn the line had to make to go under the pump and then there was another sharp turn to come up to the raw sand tank. The reason we had it encased is because that particular line would tend to wear out pretty frequently and it's easier to replace that line if you had a casing and if you replaced it every three years or four years or whatever, then we can pull it out of the casing and then put it back in without digging up the railroad track and that line had a history of needing to be replaced every three to five years something like that I don't know exactly.

* * *

Q. But if the slurry pipe broke underneath the ground, the casing would prevent it from bubbling up through the track, right? So if it breaks right here if it has got

a bigger pipe around it as the product breaks it's going to come out to the end and if the railroad track is right above it, it can't undermine the railroad track, right?

A. Yes.

* * *

[Tr. 219, R. 152]

* * *

Q. If, sir, the eight and nine lines had been cased from outside of one railroad track to the outside of the other, when it ruptured it could not have caused a hole on Saturday or Monday, could it?

[Tr. 220, R. 153]

* * *

A. I don't believe you could have had that type of wash-out if it had been encased.

[Testimony of Ronald H. Dunn, Tr. 373, R. 306]

* * *

[Tr. 390, R. 323]

* * *

Q. All right, Mr. Dunn, are there certain standards and guidelines which apply to industry track and the operation of those tracks in construction and design?

A. I'm sorry, I do not –

Q. Are there standards and guidelines which apply?

A. Yes, sir.

Q. All right, is one of those the American Railway Engineering Association Standards?

A. Yes, sir.

* * *

[Tr. 392, R. 325]

* * *

Q. And do the standards and guidelines which are issued by the area constitute the industry standards for the operation, maintenance, design and construction of railroad industry side track including pipe lines?

A. That's true. The individual railroads sometimes adopt the standards of the area verbatim, sometimes they will because they feel that they have some unique circumstances area does not cover that's unique to their particular property they will modify those recommended standards of area. But by and large the standards of area are adhered to throughout the railroad industry.

* * *

[Tr. 397, R. 330]

Q. Mr. Dunn, I am going to give you back your copy. Would you tell the ladies and gentlemen of the jury if an industry wants to install a pipe line underneath an industry railroad track, what must they do?

A. It must notify the railroad with the details of the commodity to be conveyed in the pipe and that being whether it is flammable or inflammable, the location of it, the depth of it, the size of the pipe and the diameter of the casing and the thickness of the wall of the pipe casing itself.

Q. And they most notify the railroad?

A. Must notify the railroad and submit that information to the railroad for the railroad's approval and then proper coordination must take place so that a railroad can have a representative there to inspect [Tr. 398, R. 331] the installation of this facility under the track be it industry track or a railroad main track. At any rate if it is a track the railroad is going to operate over, it has to know.

Q. Can there be exception granted by the railroad to leave a pipe uncased?

A. Under industry track there can be exceptions granted by the engineer for the railroad and that engineer is the chief engineer of the railroad or his designated representative.

Q. Is that the industry's decision or the railroad's decision?

A. It's the railroad's decision solely.

Q. Mr. Dunn, I would like to go now since we have these standards established and ask you if Norfolk Southern has standards which apply?

A. Yes, Norfolk Southern has standards. They adopted the area standards.

Q. We've got the industry wide standard and now we have the specific Norfolk Southern. Tell us, are they the same or different?

A. They are the same.

Q. How do you know they are the same?

A. From the Norfolk Southern Orange Book.

Q. And what is the Orange Book, please sir?

A. The Orange Book is the Norfolk Southern standard that is entitled Guidelines for Design and Construction of Privately Owned Industry Tracks.

Q. Is a privately owned industry track the same as the United States Silica Track at Edmonds, South Carolina?

[Tr. 399, R. 332]

A. Yes, it is.

* * *

[Tr. 408, R. 341]

* * *

Q. Do you have an opinion whether this accident would have occurred and the way it did and where it did if U.S. Silica and Norfolk Southern had complied with the guidelines and standards which apply to the casing of pipes? Do you have an opinion?

A. Yes, I do.

Q. And what is that opinion?

A. The installation of a casing or the provision of a casing on that slurry line would not have prevented the pipe from rupturing, but it would have prevented a wash-out under the track.

Q. And would it have maintained a structural integrity and the safety of the track for operating the train and the men that work on them and fix the track?

A. Yes, sir, and that's predominantly because the area standards adopted by Norfolk Southern required that a casing through which a water line or fuel line is passing under a track extends twenty-five feet each way of the center line of the track.

* * *

[Testimony of Edward G. Cody, Tr. 614, R. 544]

* * *

[Tr. 639, R. 569]

* * *

Q. And Exhibit 14, in fact, contains to the extent the railway requires compliance with it it contains portions of these standards, doesn't it?

A. Yes, sir.

[Tr. 640, R. 570]

Q. It contains the standards with respect to piping under the tracks?

A. Yes.

Q. It contains the standards that you adopt with respect to casing?

A. Yes, sir.

Q. And absent an agreement with a company, a private company, and the private company builds its own track, doesn't it?

A. That's correct.

Q. It hires its own railroad contractor?

A. That's correct.

Q. And builds its track according to specifications?

A. That's correct.

Q. And pays for it?

A. That's correct.

Q. And absent an agreement with Norfolk Southern as to how they build it, they can build it any way they choose?

A. Their plans would have had to be approved by our engineering and design department before they could build the track.

Q. All right, do you have a record of any plans and specifications at U.S. Silica?

A. I'm not sure. I don't.

Q. But those plans and specifications would then tell you whether the piping that is underneath the track when it's built are encased or not.

A. Yes, sir.

* * *

[Testimony of C. A. Smith, Tr. 867, R. 792]

Q. Good afternoon, Mr. Smith.

A. Good Afternoon.

Q. Mr. Smith, do you work for Norfolk Southern Railroad?

A. Yes, sir.

Q. How long have you worked for the Norfolk Southern Railroad?

A. Almost twenty-eight years.

Q. And what is your job with Norfolk Southern Railroad?

A. Track supervisor.

[Tr. 868, R. 793]

Q. And one of your assistant track supervisor's, Dave Rogers, is the plaintiff in this case?

A. Yes.

Q. Are you familiar with the reason we are here with this lawsuit concerning the hole out at U.S. Silica?

A. Yes, sir.

Q. Have you been to this facility yourself?

A. Yes, sir.

Q. Did you, in fact, go there on the afternoon of June 28, 1993?

A. Yes, sir.

Q. Before you went did you receive a call from someone alerting you to something out at U.S. Silica?

A. Yes, I did.

Q. Who called you and what did they say and what did you do?

A. I believe I received a call from Mr. Roberson in Columbia. He is the superintendent of terminals in Columbia, South Carolina.

Q. I ask you if Mr. Pete Coleman, you know, he was the conductor involved, would he have called in to Mr. Roberson or somebody else?

A. Mr. Roberson or the yard master, whoever he got.

Q. And Mr. Roberson called you. And what did he tell you?

A. He told me that the loco was at U.S. Silica and there was a hole in the track and they were afraid to go across the hole and wanted somebody to come and inspect it.

Q. And so what did you do?

A. I sent Mr. Rogers to check it out.

* * *

[Tr. 876, R. 801]

* * *

Q. Do you have any idea, Mr. Smith, that in inspecting the repair that U.S. Silica made of the pipe on the Tuesday, June 29, following Mr. Rogers hurting his back made any determination as to whether or not the repair of that pipe or replacement of that pipe, were you aware that the pipe was, in fact, replaced?

A. The next day?

Q. Yes, sir.

A. No, I don't know what type repair was done.

Q. You are not aware of that?

A. No.

Q. Would you have been the person to instruct the assistant track supervisor or the person who is filling in for Mr. Rogers to go inspect the track?

A. Yes, sir.

Q. Did you instruct them to inspect the track to make sure the piping put under that track was encased?

A. No.

Q. You did not?

A. No.

Q. Have you at any time required to your knowledge that U.S. Silica encase any pipe running under the track?

A. Have I instructed them to?

[Tr. 877, R. 802]

Q. Yes, sir.

A. I haven't.

Q. Are you still the track supervisor in charge of the assistant track supervisor that inspects their premises?

A. Yes, sir.

Q. And so you did not instruct to your knowledge anybody before June 28, 1993 to ascertain that any pipes under their tracks be encased?

A. No.

Q. And did you not instruct anyone to determine that the repair of this on June 28th the repair or replacement of any pipes at that time be encased?

A. Well, the only way you would know that is if you were there when it was made.

Q. Do you recall that anyone has ever asked U.S. Silica whether the repair of that pipe the next day when they replaced it was encased?

A. I haven't.

Q. To your knowledge you never required U.S. Silica to encase any pipe?

A. That's not in my area of responsibility.

Q. But it is in your area of responsibility and those under you to inspect the industry track at U.S. Silica?

A. That's right, yes, sir.

Q. It is U.S. Silica's obligation and responsibility to perform the maintenance on their own track?

A. Yes, sir.

[Tr. 878, R. 803]

Q. They, in fact, own the track?

A. That's right.

Q. Do you and your track – assistant track supervisor even dictate to them how they will effect the repairs?

A. We tell them what repairs need to be made.

Q. Do you point them out to a problem that you have with the track either the rails are bent or whatever it may be and then they effect the repairs themselves?

A. That's right.

Q. So you are there to inspect and point out any problems?

A. Right.

* * *

[Colloquy between Court and Counsel, Tr. 980, R. 905]

* * *

[Tr. 986, R. 908]

* * *

The Court: They have a duty under the FELA to maintain a safe working place for their employees, don't they?

Mr. McMaster: Yes, sir, they do. They do that, but, again, there must be some evidence of negligence.

The Court: Well, isn't there facts in which it could be inferred that they breached their duty to require the co-defendant, U.S. Silica, to encase those pipes? There's testimony in the record, isn't there, from which that fact could be inferred? I'm not saying that that's what they will find, but isn't there evidence in the record?

Mr. McMaster: I think Mr. Dunn said that or something like that.

The Court: Mr. McKenzie, would you like to respond to that in any way or Mr. Tucker, I'm sorry.

Mr. McKenzie: If you have any question about it, obviously, they did not require U.S. Silica.

The Court: I think there's evidence in the record in which it could be inferred that the defendant railroad was negligent. All right.

* * *

APPENDIX F

[seal omitted]

The Supreme Court of South Carolina

DANIEL E. SHEARHOUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK FAX

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1090
(803) 734-1499

November 6, 2003

[names/addresses of counsel
for petitioner omitted]

Re: Rogers, John v. Norfolk Southern Corp.

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ James E. Moore A.C.J.
s/ Costa M. Pleicones J.
s/ James C. Williams, Jr. A.J.

I would grant rehearing.

s/ John H. Waller, Jr. J.
s/ E. C. Burnett, III J.

November 6, 2003."

The remittitur is today being forwarded to the lower court.

Very truly yours,

/s/ DANIEL E. SHEAROUSE
CLERK

[notations omitted]

APPENDIX G

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
Clerk of the Court
(202) 479-3011

January 27, 2004

Mr. David C. Frederick
Kellogg Huber Hansen Todd & Evans
1615 M Street, NW
Suite 400
Washington, DC 20036

Re: John David Rogers
v. Norfolk Southern Corp., et al.
Application No. 03A623

Dear Mr. Frederick:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to The Chief Justice, who on January 27, 2004 extended the time to and including March 5, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
By
/s/ SANDY SPAGNOLO
Sandy Spagnolo
Case Analyst

[attached notification list omitted]

APPENDIX H

Statutory Provisions

The Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, provides:

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

45 U.S.C. § 52. Carriers in Territories or other possessions of United States

Every common carrier by railroad in the Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 55. Contract, rule, regulation, or device exempting from liability; set-off

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U.S.C. § 56. Actions; limitation; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

45 U.S.C. § 57. Who included in term "common carrier"

The term "common carrier" as used in this chapter shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

45 U.S.C. § 58. Duty or liability of common carriers and rights of employees under other acts not impaired

Nothing in this chapter shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other Act or Acts of Congress.

45 U.S.C. § 59. Survival of right of action of person injured

Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

45 U.S.C. § 60. Penalty for suppression of voluntary information incident to accidents; separability

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.

If any provision of this chapter is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the chapter and the applicability of such provision to other persons and circumstances shall not be affected thereby.